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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GOUVEIA, ET AL.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment requires appointment of counsel for an indigent prison inmate under criminal investigation during the time he is being held in administrative detention following the alleged offense but before the institution of adversary judicial proceedings.

2. Whether, in the absence of a specific showing of prejudice, dismissal of the indictment is the appropriate remedy for failure to appoint counsel once an indigent prison inmate is held in administrative detention more than 90 days because of a pending criminal investigation.

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption of this case, Robert Ramirez, Philip Segura, Adolpho Reynoso, Robert Eugene Mills, and Richard-Raymond Pierce were appellants below and are respondents here.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App. A, *infra*, 1a-29a) is reported at 704 F.2d 1116. An earlier opinion of the court of appeals in the case of respondents Mills and Pierce (App. B, *infra*, 30a-40a) is reported at 641 F.2d 875. An earlier opinion of the district court in the case of respondents Mills and Pierce (App. C, *infra*, 41a-50a) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 26, 1983. On June 17, 1983, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including July 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.

STATEMENT

This case raises the question whether the Sixth Amendment requires that counsel be appointed for an indigent prison inmate under criminal investigation during the time he is held in administrative detention following the alleged offense, but before the institution of adversary judicial proceedings. The court of appeals consolidated appeals from two separate sets of district court convictions involving prison inmate murders, both of which raised this issue.

1. Respondents Gouveia, Ramirez, Segura and Reynoso

Following a jury retrial in the United States District Court for the Central District of California, the four respondents were convicted of murder and conspiracy to commit murder, in violation of 18 U.S.C. 1111 and 1117 respectively. Each was sentenced to consecutive terms of imprisonment for life and 99 years. App. A, *infra*, 3a.

a. On November 11, 1978, inmate Thomas Trejo was stabbed to death at the Federal Correctional Institution at Lompoc, California. An autopsy revealed that Trejo had suffered 45 stab wounds, most of which were in the area of his heart (Tr. 149).¹

Following the murder, the Federal Bureau of Investigation and prison officials began independent investigations to determine the identity of the murderers. Respondents Gouveia and Reynoso and inmate Pedro Flores were immediately placed in the Administrative Detention Unit ("ADU") at Lompoc (C.R. No. 40, Reynoso Declaration

¹ "Tr." signifies the transcript in the case of the Gouveia respondents.

at 1; C.R. No. 62 at 15).² While in ADU, the two respondents were separated from the remainder of the prison population, and their participation in various prison programs was curtailed. However, they were not deprived of regular visitation rights, exercise periods, access to legal materials, and telephones from which they could make unmonitored calls to attorneys. See App. A, *infra*, 3a, 6a; 28 C.F.R. 540.50(c), 540.101, 540.102, 540.105, 541.19, 541.20, 543.11(j), 543.13; C.R. No. 62 at 21; Tr. 2411.

On November 22, 1978, Gouveia, Reynoso, and Flores were removed from ADU and returned to the general prison population (C.R. No. 40, Reynoso Declaration at 1; C.R. No. 62 at 15). However, on December 4, 1978, all four respondents, as well as Flores and inmate Steven Kinard, were placed in ADU pending further investigation after prison officials obtained further information that implicated the six in the murder (see C.R. No. 40, Reynoso Declaration at 1; C.R. No. 33, Exh. C; C.R. No. 42 at 19; C.R. No. 62 at 15). Later in December, prison authorities conducted disciplinary hearings. Respondents requested appointment of counsel at the hearings, but the requests were denied (*e.g.*, C.R. No. 40, Reynoso Declaration at 1-2; C.R. No. 42 at 19; C.R. No. 60 at 2-3). Prison officials determined that the four respondents each had participated in the murder of Trejo and ordered that they be returned to ADU (App. A, *infra*, 2a).³ There-

² "C.R." signifies the district court Clerk's Record in the case of the *Gouveia* respondents. The number following the abbreviation corresponds with the entry number on the district court docket sheet.

³ The reasons for the decision to return respondents to ADU are not set forth clearly in the record. However, a prison form dated December 1978, submitted as an exhibit to co-defendant Flores' motion to dismiss, indicates that he was placed in ADU pending investigation for violations of prison rules and crimes committed in the prison and because his "[c]ontinued presence * * * in general population pose[d] a serious threat" to other inmates and to the security of the institution (C.R. No. 33, Exh. C). Respondents

after, prison authorities directed that Gouveia and Ramirez be transferred to the control unit of the United States Penitentiary in Marion, Illinois, based on a finding that they were too dangerous to be maintained in the general prison population at Lompoc (C.R. No. 43 at 5; C.R. No. 60 at 4).

In March 1979, after the FBI notified the United States Attorney of the results of its investigation, the matter was presented to a grand jury, which, on June 17, 1980, indicted respondents, Flores, and Kinard for murder and conspiracy to commit murder. In addition, Reynoso, Kinard, and Flores were charged with conveyance of a weapon in a penal institution, in violation of 18 U.S.C. 1792. On July 14, 1980, respondents were arraigned in federal court, at which time they were appointed counsel (App. A, *infra*, 3a).

b. Prior to trial, respondents and Flores moved to dismiss the indictment on the ground that the 19-month period between their removal to ADU and their indictment violated the Sixth Amendment right to a speedy trial or, alternatively, constituted unreasonable preindictment delay in violation of the Due Process Clause of the Fifth Amendment. They also argued that the failure of prison authorities to appoint counsel to represent them during the period they were in administrative detention, coupled with their own inability to begin preparation of a defense because of their segregation from the general inmate population, violated their Sixth Amendment right to effective assistance of counsel.

Respondents made various factual representations to support their claims. For example, Gouveia acknowledged that he had obtained some information from the transcript of an FBI interview, and his counsel stated that he had learned from inmate rosters furnished by the

apparently were returned to ADU for similar reasons (see C.R. No. 60 at 1-2); Gouveia and Ramirez presumably were returned to ADU for the additional reason that they were pending transfer to another penal institution. See 28 C.F.R. 541.20(a).

Bureau of Prisons the whereabouts of four potential defense witnesses; however, Gouveia's counsel asserted that he was unable to obtain information about two other potential witnesses (C.R. No. 60 at 5; C.R. No. 69 at 3-7). Ramirez claimed that because of his segregation from the general prison population he had been unable to contact potential witnesses who could verify his whereabouts on the day of Trejo's death; that he knew several of these inmates only by nicknames and thus was unable to establish their identities or determine their whereabouts; and that a potential witness had died since the murder (C.R. No. 43 at 5-6). Following argument, the district court denied respondents' motions to dismiss without opinion (C.R. No. 72).

c. Trial began on September 16, 1980. The jury acquitted Flores on all counts and acquitted Reynoso on the weapon conveyance count. However, the jury was unable to reach a verdict on the murder and conspiracy charges against respondents, and a mistrial was declared on those counts.

Retrial began on February 17, 1981. Kinard, who was the government's principal witness,⁴ testified about the plans to murder Trejo. According to Kinard's testimony, Reynoso had told Kinard in early November 1978 that Trejo "had to go" by Christmas because he had made a "bad move against la cliqua" while incarcerated at Terminal Island (Tr. 488-489); Ramirez had arranged for another inmate to make several knives with which the murder would be committed (Tr. 489-500); and on the morning of the murder Reynoso stated that "the fool had to be sent home today" (Tr. 512-513). Kinard described the four respondents' actions in preparing for the murder and disposing of the weapons and blood-stained clothing

⁴ Kinard entered a plea of guilty on the weapon conveyance count prior to the first trial, with the understanding that the government would seek dismissal of the remaining counts and that he would testify on the government's behalf (Tr. 508-509).

and related their later descriptions of the stabbing (Tr. 515-559).⁶ The prosecution introduced evidence that Gouveia's fingerprints and palm print and Segura's palm print were discovered in the cell where the murder occurred (Tr. 327-328, 443-444).

Respondents called 34 witnesses, including 14 alibi witnesses, to testify on their behalf (see App. A, *infra*, 28a). Each respondent sought to establish that he was elsewhere at the time of the murder. In addition, the respondents presented evidence that the crime had been committed by others, including Kinard. For example, five witnesses corroborated Segura's testimony that he was playing handball in the morning and that at the time the murder was committed he was playing pool and watching a football game on television (*e.g.*, Tr. 1568-1569, 1579-1590, 1596-1597, 1610-1612, 1764-1767, 2141-2148). Another witness verified Ramirez' testimony that he was lifting weights at the gymnasium at the time of the murder (Tr. 1939, 2245-2247). Three witnesses testified in support of Gouveia's story that on the morning of the murders he was eating in the dining hall and thereafter went to the gymnasium (Tr. 1549-1550, 1680-1681, 2114-2119, 2370-2378). Two witnesses testified that they were watching a football game with Reynoso at the time of the murders (Tr. 1418-1420, 1442, 1520-1525). In addition, the inmates identified by government witnesses as those who fabricated the knives and brought them into the prison denied any involvement in the scheme (Tr. 1795-1796, 2424). Other witnesses testified that Kinard had told them that he and another prisoner, who had since died, had murdered Trejo following a dispute over payment for drugs (Tr. 1855-1864, 1894-1897, 2064).

⁶ Several other prisoners corroborated portions of Kinard's testimony. For example, one inmate witness testified that Reynoso returned from the prison disciplinary hearing and stated that he had lost only about 20 days' good time and that, if that was all prison authorities were going to do, he would kill again (Tr. 1214-1215).

2. Respondents Mills and Pierce

Following a jury trial in the United States District Court for the Central District of California, respondents Mills and Pierce were convicted of murder, in violation of 18 U.S.C. (Supp. V) 1111, and of conveying a weapon in prison, in violation of 18 U.S.C. 1792. Pierce also was convicted of assaulting another prisoner, in violation of 18 U.S.C. 113(c). Each was sentenced to life imprisonment on the murder charge and to a concurrent three-year term on the weapon conveyance charge. App. A, *infra*, 4a-5a. Pierce received an additional concurrent three-year term on the assault charge (Mills Tr. 1783).

a. On August 22, 1979, Thomas Hall, an inmate at Lompoc, died after being stabbed 10 times in the "E" unit of the prison (Mills Tr. 445, 482-483). Shortly after the murder, Mills and Pierce were taken into custody and examined by an FBI agent and a prison doctor, who observed that Mills' face was flushed and that he had two puncture wounds on his left arm and a spot of blood on his thumbnail. Pierce's upper arm bore bruises that appeared to be finger impressions (Mills Tr. 461, 484, 619-621, 628). The following morning, Mills and Pierce were placed in ADU on the ground that they were pending investigation for criminal offenses and violation of prison regulations and that their continued presence in the general prison population "pose[d] a serious threat to life, property, self, staff, other inmates, or to the security of the institution" (App. B, *infra*, 33a-34a; Mills C.R. No. 59, Exhs. B, C). The conditions of their confinement in ADU were identical to those described above (see App. B, *infra*, 31a).

During disciplinary hearings conducted by the Bureau of Prisons several weeks later, respondents stated that they wished to consult with counsel, but the request was denied (App. B, *infra*, 31a; Mills C.R. No. 59 at 27-28). Mills declined the offer of assistance of a staff representative to interview witnesses and help prepare his case for the disciplinary proceeding (Mills C.R. No. 59, Mills Declaration at 28). See 28 C.F.R. 541.14(b). Prison

officials concluded that Mills and Pierce had murdered Hall and returned them to ADU. The two were ordered to forfeit their accumulated good time (App. A, *infra*, 4a). In addition, prison officials informed Mills that he would be transferred to the control unit at Marion Penitentiary (Mills C.R. No. 59 at 28).

On March 27, 1980, after Mills and Pierce had been in administrative detention for approximately seven months, they were indicted by a grand jury. At the time of their arraignment on April 21, 1980, respondents were appointed counsel. App. A, *infra*, 4a.

b. Mills and Pierce moved to dismiss the indictment on the grounds that their administrative detention for seven months prior to return of the indictment violated their Sixth Amendment right to a speedy trial or, alternatively, constituted unreasonable preindictment delay. They also contended that the failure of prison authorities to appoint counsel to represent them when they were placed in administrative detention violated their Sixth Amendment right to counsel.

In support of their claims of prejudice, Mills and Pierce alleged that lack of access to witnesses during the period in which they were confined in ADU "severely undermined" their ability to prepare a defense; that the time lapse following the murder prevented witnesses from recalling the details of the evening of August 22, 1979, "as clearly as they had . . . last fall," and that, in many cases, "defense witnesses are unable, . . . to remember who they were with [and] the times the crucial events took place" (Mills C.R. No. 59 at 16). Respondents also alleged that the release or transfer of some potential witnesses to other institutions had made it difficult to locate them, that it was impossible to find other potential witnesses who were known only by nicknames, that some witnesses were reluctant to testify, and that memories had faded (*id.* at 16-17; No. 49 at 7-8; No. 73 at 17-25). Finally, respondents

claimed that the time lapse made it impossible to analyze blood stains found on clothing; that evidence relating to the case had been lost or destroyed; and that their own physical wounds, which might have had some probative value for their defense, had healed (*id.* No. 49 at 9; No. 73 at 7-8).

On August 14, 1980, the district court granted the motion to dismiss the indictment (App. C, *infra*, 41a-50a). The court first concluded that respondents stood accused of the murder at the time they were committed to ADU and that, because the government failed to justify the ensuing 10-month delay in bringing them to trial, they were denied their Sixth Amendment right to a speedy trial. Alternatively, the court found that respondents were denied due process because their continued administrative detention after the government had substantially completed its investigation irreparably prejudiced their ability to prepare for trial. Finally, the court found that the government's failure to appoint counsel to represent respondents promptly after their placement in ADU deprived them of the Sixth Amendment right to counsel, as well as their due process right to prepare a defense. The court reasoned that respondents "were denied any effective opportunity to have an investigation conducted on their behalf while events were still recent and recollections intact" and that the passage of time "resulted in the irrevocable loss of exculpatory testimony and evidence * * *" (App. C, *infra*, 49a, 50a).

c. The court of appeals reversed (App. B, *infra*, 30a). It rejected the district court's holding that the 10-month delay between respondents' placement in ADU and the trial violated the Sixth Amendment Speedy Trial Clause, since administrative detention by prison authorities is not an "arrest" or "accusal" for speedy trial purposes (App. B, *infra*, 34a). The court of appeals held that the right to counsel did not attach until the initiation of formal adversary proceedings by way of indictment in

March 1980 (*ibid.*). Finally, the court of appeals noted respondents' claims of prejudice, but dismissed them as speculative (*id.* at 36a-37a).⁶

d. At trial, the government presented eyewitness testimony linking Mills and Pierce to the murder of Hall. The evidence showed that prior to the murder Mills told another inmate that he knew who was responsible for providing information that caused Mills to be placed temporarily in administrative detention and that Mills was going to "take care of it" upon his release from detention (Mills Tr. 344-345); in fact, it was Hall who had provided the information to prison authorities (*id.* at 474-476). The day before the murder Hall confronted Mills and demanded repayment of a debt (*id.* at 289). On the day of the murder there were several confrontations between Hall and Mills and Pierce (*id.* at 76-77, 291-292). After dinner, inmate Mellen, who was Hall's friend, heard Hall scream for help; he then saw Mills hold Hall from behind while Pierce stabbed Hall in the abdomen (*id.* at 88-96, 109). Other witnesses corroborated Mellen's testimony. For example, inmate Ehle testified that before the murder he had overheard Mills tell inmate John Able, identified as the leader of a prison gang known as the Aryan Brotherhood, that Mills was going to "move on" an inmate who owed him money; Mills asked Able whether the murder would make him eligible for membership in the Brotherhood (*id.* at 561-563). Ehle also testified that he overheard Mills discussing the murder with Able after it occurred (*id.* at 591-593). A substantial amount of physical evidence, including blood-stained clothing and wounds on the arms of both Mills

⁶ Judge Nelson issued a concurring opinion in which she stated that respondents' due process claims could properly be raised at trial (App. B, *infra*, 40a).

Following the court of appeals' reversal of the order dismissing the indictment, both respondents filed petitions for writs of certiorari, which were denied by this Court. 454 U.S. 902 (1981).

and Pierce, linked respondents to the murder (*id.* at 189-190, 418-425, 508-510, 618-621).

Mills and Pierce presented 42 witnesses, including six alibi witnesses. Three inmates testified that they were watching the entrance to the "E" unit during the period when the murder occurred but did not observe respondents enter or leave (Mills Tr. 682, 708-709, 728). Six witnesses corroborated Pierce's testimony (*id.* at 1401-1402) that he and Mills were eating a meal at the time of the crime and were locked in the dining hall with other prisoners immediately after its discovery (*id.* at 756-758, 777-779, 801-804, 819-824, 849-851, 1135-1137). Three inmates testified that they witnessed the crime and that, contrary to Mellen's testimony, the assailants were masked at all times, so that their identities could not be determined (*id.* at 985-992, 1028-1030, 1048-1050). Other witnesses testified that Hall was an informant and had many enemies in the prison population (*id.* at 1106-1109) and that bruises and cuts observed by investigators on the respondents' bodies shortly after the murders resulted from athletic injuries (*id.* at 1223-1225, 1325-1328). Several expert witnesses called by the defense challenged the accuracy of opinion testimony by government witnesses or testified based on the physical evidence that it was unlikely that respondents committed the murder (*e.g.*, *id.* at 902-903, 1278-1290, 1312-1318).

3. The Decision of the Court of Appeals

The en banc court of appeals consolidated the *Gouveia* and *Mills* cases. By a vote of six to five, it reversed the convictions and remanded for dismissal of the indictments. The majority held that when an inmate is separated from the general prison population for more than 90 days pending a criminal investigation, the Sixth Amendment requires that he be appointed counsel (App. A, *infra*, 17a).

The majority recognized that under this Court's decisions the right to counsel attaches only when formal

judicial proceedings are initiated. It reasoned, however, that "[t]he point of 'accusation' may be different for the prosecution of prison crimes, where the subject is already incarcerated and subject to the discretion and discipline of federal authorities" (App. A, *infra*, 7a). Proceeding from this premise, the majority concluded that, although separation of inmates from the general prison population properly serves disciplinary and security functions (*id.* at 10a), such detention becomes "accusatory" when one of the purposes is to isolate the prisoner pending investigation and trial (*id.* at 11a).

The majority acknowledged (App. A, *infra*, 11a) that administrative detention is necessary to further important governmental investigative interests, such as the protection of potential witnesses in the prison population. However, it observed that such detention deprives the prisoner of the opportunity to prepare a defense or even to keep track of the location of other inmate-witnesses in a transient prisoner population. This inability, the majority reasoned, "distinguishes [respondents] from suspects outside of prison who have not yet been arrested or indicted;" the position of such detainees "more resembles that of a suspect outside of prison who has been arrested and detained than that of an outside suspect who has been neither arrested nor detained" (*id.* at 12a). The majority noted that a suspect outside prison who is arrested and detained normally is arraigned without delay, at which time the right to counsel attaches; it concluded by analogy that "the administrative detention of an indigent inmate who is suspected of a crime does, under certain circumstances, give rise to the right to appointed counsel" (*id.* at 13a, 15a).

The majority then considered the circumstances under which administrative detention would trigger the right to counsel. Purporting to interpret applicable Bureau of Prisons regulations, the majority concluded that the maximum stay in segregation for purely disciplinary reasons is 90 days, and that any segregation for a period exceeding 90 days must be for investigative purposes. The

majority stated that "[i]f an inmate is held after the maximum disciplinary period has expired, he should be allowed to show that his detention, at least in part, is due to pending investigation or trial for a criminal act." If the inmate establishes indigency and requests counsel, "prison officials must either refute the inmate's showing, appoint counsel, or release the inmate back into the general prison population" (App. A, *infra*, 17a). The majority concluded that prison authorities had violated the 90-day rule it had fashioned and that respondents thus had been denied the right to counsel.⁷

The majority then held that dismissal of the indictments was the appropriate remedy (App. A, *infra*, 20a-23a). It acknowledged (*id.* at 20a) that under *United States v. Morrison*, 449 U.S. 361, 364-365 (1981), the remedy for Sixth Amendment deprivations must be tailored to the injury suffered. It rejected the government's argument that none of the respondents had demonstrated actual and specific prejudice. The majority concluded that the belated appointment of counsel, coupled with respondents' prolonged administrative detention following the murders, handicapped the ability of respondents' attorneys to defend them at trial, citing the respondents' allegations of prejudice and the statements of the district court that had dismissed the indictments in the *Mills* case at the pretrial stage (App. A, *infra*, 20a-23a). The majority concluded that in any event it was appropriate to presume prejudice because ordinarily it would be difficult to prove or refute its existence (*id.* at 22a-23a).

Judge Wright dissented in an opinion joined by Judges Choy, Kennedy, Anderson, and Poole (App. A, *infra*, 24a-29a). The dissenters pointed out that the majority had confused right to counsel principles with speedy trial principles when it applied a *de facto* accusation concept.

⁷ The majority found it unnecessary to reach respondents' claims based on the Fifth and Eighth Amendments (App. A, *infra*, 5a).

They concluded that extension of the right to counsel to the preindictment investigative period contravenes decisions in which this Court has stated that the right to counsel attaches only at the time adversary judicial proceedings are initiated. The dissenters also noted that the majority's presumption of prejudice and dismissal of the indictment were inconsistent with *United States v. Morrison, supra*. The dissenters pointed out that the potential prejudice referred to by the majority resulted primarily from the passage of time, rather than ineffective assistance of counsel (App. A, *infra*, 28a), and that there are adequate remedies, short of dismissal of the indictment, for prejudice resulting from any governmental interference with access to witnesses (*id.* at 28a-29a). The dissenters concluded that the majority had departed substantially from Supreme Court precedent and that "review by that Court is indicated" (*id.* at 29a).⁸

REASONS FOR GRANTING THE PETITION

The court of appeals' holding that the Sixth Amendment requires appointment of counsel for indigent inmates held in administrative detention pending criminal investigation represents a radical departure from this Court's decisions defining the right to counsel. Under those decisions, it is well established that the right to counsel attaches only at the initiation of adversary judicial proceedings. The court of appeals nevertheless concluded that in the prison setting the right to counsel arises wholly independent of the filing of any formal judicial charges against an inmate.⁹

⁸ On May 16, 1983, the court of appeals stayed the issuance of the mandate for a 90-day period commencing May 9, 1983.

⁹ This case involves only the issue of the right to appointment of counsel for indigent inmates. The respondents were not denied the opportunity to retain their own counsel during the time they were in administrative detention (App. A, *infra*, 3a, 6a). Nor was there any claim that respondents' counsel rendered ineffective

In addition, the court of appeals' conclusion that dismissal of the indictment normally will be the appropriate remedy for the failure to appoint counsel at an early stage, despite the absence of any specific showing of substantial prejudice, conflicts with this Court's decision in *United States v. Morrison*, 449 U.S. 361 (1981), which requires that the remedy for a violation of the right to counsel be tailored to the injury suffered. The court's virtually irrebuttable presumption that in such circumstances there will be irreparable prejudice to prison inmates, resulting in denial of a fair trial, is not well founded.

The court of appeals' "unprecedented expansion of the right to counsel" (App. A, *infra*, 24a) will have a significant effect on the administration of federal and state prisons and on the criminal justice system in the Ninth Circuit. The decision below threatens to interfere with important security measures taken by prison authorities in connection with prison crimes. In addition, the court's conclusion that dismissal of the indictment is the proper remedy means that not only these respondents, but also many other individuals who have committed serious institution crimes, will escape criminal penalties entirely. In view of the court of appeals' radical departure from the decisions of this Court and the significant impact of the decision below, review by this Court is warranted.

1. Each respondent was placed in the administrative detention unit at Lompoc after being identified as a suspect in a prison murder, and each remained there until after he was indicted. Bureau of Prisons regulations define administrative detention as "the status of confinement of an inmate in a special housing unit in a cell either by himself or with other inmates which serves to remove the inmate from the general population." 28

assistance apart from the contention that failure to appoint counsel at an earlier stage impeded the ability to mount a fully effective defense.

C.F.R. 541.20. An administrative detainee normally is confined to his cell except for regular exercise, shower, and visitation periods, and he is deprived of the usual interaction with his fellow prisoners that is provided by shared meals, work and recreation. However, administrative detainees generally are afforded the same privileges as are made available to general population inmates (*e.g.*, commissary, visitation, and correspondence privileges). 28 C.F.R. 541.20(d).¹⁰

Bureau of Prisons regulations provide that inmates may be placed in administrative detention in a variety of circumstances. 28 C.F.R. 541.20(a). In particular, prison officials may place an inmate in administrative detention "when his continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution and when the inmate * * * [i]s pending investigation or trial for a criminal act." *Ibid.*¹¹ Separation of inmate-suspects from the general prison population during the course of a criminal investigation serves important security purposes, including protection of potential inmate-witnesses from intimidation and prevention of subornation of perjury.¹² The federal concerns under-

¹⁰ Bureau of Prisons regulations distinguish between "administrative detention" and "disciplinary segregation." Under the regulations, "[i]nmates housed in disciplinary segregation have significantly fewer privileges than those housed in administrative detention." 28 C.F.R. 541.19(a). The record appears to indicate that respondents were in administrative detention, as opposed to disciplinary segregation, during the entire period of their separation from the general prison population.

¹¹ Under the regulations, an inmate may also be placed in administrative detention if he is pending hearing or investigation in connection with a violation of prison regulations, is pending transfer to another institution, needs protection, or is terminating confinement in disciplinary segregation and placement in the general prison population is not prudent. 28 C.F.R. 541.20(a).

¹² For instance, there is evidence that members of the Aryan Brotherhood, to which respondent Mills sought admission (Mills

lying such detention are similar to state interests in detention of inmates pending investigation, recognized by this Court in *Hewitt v. Helms*, No. 81-638 (Feb. 22, 1983), slip op. 14-15: "[The state] must protect possible witnesses—whose confinement leaves them particularly vulnerable—from retribution by the suspected wrongdoer, and, in addition, has an interest in preventing attempts to persuade such witnesses not to testify at disciplinary hearings." See also *id.* at 16 n.9 (noting that pendency of a state criminal investigation was a factor properly taken into account in continuing administrative detention). These are the concerns that underlay the placement of respondents in administrative detention during the time the FBI and prosecutors conducted investigations of the murders.

2. The decisions of this Court make clear that the Sixth Amendment right to counsel attaches only at the initiation of adversary judicial proceedings:

In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell v. Alabama*, 287 U.S. 45, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. See *Powell v. Alabama*, *supra*; *Johnson v. Zerbst*, 304 U.S. 458; *Hamilton v. Alabama*, 368 U.S. 52; *Gideon v. Wainwright*, 372 U.S. 335; *White v. Maryland*, 373 U.S. 59; *Massiah v. United States*, 377 U.S. 201; *United States v. Wade*, 388 U.S. 218; *Gilbert v. California*, 388 U.S. 263; *Coleman v. Alabama*, 399 U.S. 1.

Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality opinion). Accord, *Estelle v. Smith*, 451 U.S. 454, 469-470

Tr. 562-563), have sworn to perjure themselves on behalf of fellow members who may be prosecuted. See *United States v. Abel*, 707 F.2d 1013, 1016 (9th Cir. 1983).

(1981); *Moore v. Illinois*, 434 U.S. 220, 226-227 (1977).¹³ Of course, the Sixth Amendment by its terms refers to rights in connection with "criminal prosecutions." Moreover, practical considerations support the conclusion that the right to counsel does not attach until the commencement of adversary judicial proceedings:

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. See *Powell v. Alabama*, 287 U.S. at 66-71; *Massiah v. United States*, 377 U.S. 201; *Spano v. New York*, 360 U.S. 315, 324 (Douglas, J., concurring).

Kirby v. Illinois, *supra*, 406 U.S. at 689-690 (footnote omitted). Accord, *Moore v. Illinois*, *supra*, 434 U.S. at 227, 228.

The court of appeals disregarded these well-established principles in concluding that respondents' right to appointed counsel attached 90 days after they had been placed in administrative detention following commission of a criminal offense—at which point the government was still conducting its investigation and had not yet determined whether prosecution was warranted.¹⁴ The court

¹³ The initiation of adversary judicial proceedings may occur at the time of formal charge, preliminary hearing, indictment, information, or arraignment. See *Estelle v. Smith*, *supra*, 451 U.S. at 469-470; *Moore v. Illinois*, *supra*, 434 U.S. at 226-229; *Kirby v. Illinois*, *supra*, 406 U.S. at 689.

¹⁴ The court of appeals acknowledged (App. A, *infra*, 10a) that there is no right to counsel in connection with prison disciplinary proceedings. See *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 569-570 (1974).

of appeals attempted to avoid the apparent inconsistency between its holding and this Court's right to counsel cases by announcing that an inmate becomes an "accused" after 90 days of administrative detention (App. A, *infra*, 13a, 16a-17a). This analysis is plainly wrong. To begin with, even if continuation of administrative detention were equivalent to some sort of "accusation", it would not trigger the right to counsel, which attaches only at the initiation of adversary judicial proceedings. Moreover, assuming for the sake of argument that a speedy trial analysis could be applied to the right to counsel (see *id.* at 24a-25a), the court's reasoning would still be incorrect. It is not detention alone that triggers the right to a speedy trial under the Sixth Amendment; rather, both arrest and "holding to answer a criminal charge" are necessary to engage the speedy trial provision. *United States v. Marion*, 404 U.S. 307, 520 (1971). See also *id.* at 321 (referring to a defendant who "has been arrested and held to answer"); *United States v. MacDonald*, 456 U.S. 1, 7 (1982) ("no Sixth Amendment right to a speedy trial arises until charges are pending"); *id.* at 8-9 (speedy trial guarantee inapplicable once charges are dismissed). An inmate in administrative detention is not held to answer a criminal charge until such a charge is made, *e.g.*, at the time of indictment.¹⁵

¹⁵ The court of appeals acknowledged (App. A, *infra*, 14a) that, under its own case law and that of other circuits, segregation of an inmate from the general prison population does not constitute an "arrest" or "accusation" for speedy trial purposes. See *United States v. Clardy*, 540 F.2d 439, 441 (9th Cir.), cert. denied, 429 U.S. 963 (1976); *United States v. Blevins*, 593 F.2d 646 (5th Cir. 1979); *United States v. Duke*, 527 F.2d 386, 389-390 (5th Cir.), cert. denied, 426 U.S. 952 (1976). See also *United States v. Mills*, 704 F.2d 1553, 1556-1557 (11th Cir. 1983). It is thus especially ironic that it should attempt to justify its decision by reference to speedy trial criteria heretofore deemed irrelevant to the less elastic right to counsel.

It is simply incorrect to view administrative detention as in any way accusatory. It is prison officials, not prosecutors, who make the decision to place or retain an inmate in administrative detention. The purpose of such detention is not to accuse or to initiate judicial proceedings. Rather, separation of an inmate from the general prison population serves security purposes, including protection of other inmates, prison staff, and the institution as a whole. As the court of appeals itself recognized (App. A, *infra*, 10a), administrative detention "is perhaps the princip[al] remedy available to prison officials when crime or other disturbances threaten the prison environment." In particular, as we described above (pages 15-17), administrative detention pending a criminal investigation or trial serves significant security purposes, such as preventing suspects from intimidating or injuring potential witnesses. Detention for these purposes does not amount to an "accusation."¹⁶

¹⁶ Disciplinary segregation (as opposed to administrative detention, see note 10, *supra*) may be imposed as punishment following a prison disciplinary hearing. Such segregation does not constitute an "accusation" or initiation of a criminal prosecution to which Sixth Amendment rights attach any more than does administrative detention. In any event, as noted above (note 10), it does not appear that respondents were held in disciplinary segregation at any time; rather, they were in administrative detention.

We note that in developing its theory of when separation from the general prison population would become "accusatory," the court of appeals appears to have misread Bureau of Prisons regulations. The court concluded (App. A, *infra*, 17a) that the maximum period of segregation for disciplinary reasons would be 90 days. However, under 28 C.F.R. 541.11 the maximum period of disciplinary segregation following a disciplinary hearing is 60 days (assuming only one offense is involved), while under 28 C.F.R. 541.20(a) an inmate may be held in post-disciplinary detention for up to 90 days. Thus, contrary to the court of appeals' calculation, an inmate could spend a total of 150 days away from the general prison population after disciplinary segregation had been imposed (or perhaps more if more than one offense is involved). No such specific time limits are imposed in connection with administrative detention, although prison staff conduct periodic reviews

The court of appeals concluded (App. A, *infra*, 11a-12a) that a right to counsel at the preindictment stage would be appropriate because it is difficult for an inmate in administrative detention to conduct an investigation and prepare a defense to criminal charges that might eventually be filed against him. But this Court has never suggested that a constitutional right to counsel attaches prior to indictment whenever a potential defendant lacks investigative resources.¹⁷ Indeed, if this were the case, the government would be required to provide counsel for many suspects, both inside and outside prisons.¹⁸

In any event, the court of appeals' concerns about the ability of respondents to investigate and prepare a defense are properly addressed under due process standards, not under a Sixth Amendment right to counsel analysis. The sort of prejudice alleged by respondents—faded memories and inability to locate witnesses or examine physical evidence—is quite similar to that alleged in *United States v. Marion*, 404 U.S. 307 (1971), and *United States v.*

to determine whether continued detention is appropriate. 28 C.F.R. 541.20.

¹⁷ Cf. *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (noting that the Constitution "nowhere specifies any period which must intervene between the required appointment of counsel and trial"); *United States v. Ash*, 413 U.S. 300 (1973) (right to counsel applies to trial-like confrontations, not to prosecutor's investigations or interviews with witnesses).

¹⁸ As the dissenters noted (App. A, *infra*, 26a), obstacles similar to those respondents faced may confront an individual who is convicted and imprisoned for one crime while investigation for other offenses is underway or an individual whose probation or parole is revoked for renewed criminal activity. Moreover,

[e]ven free suspects often lack the investigatory advantages the majority attributes to them. Many law enforcement investigations are confidential and continue for months or years. Like [respondents], the targets in such cases have limited knowledge or none about the investigations.

Ibid.

Lovasco, 431 U.S. 783 (1977), in which the Court concluded that allegations of prejudice resulting from pre-indictment delay are properly addressed under a due process standard, rather than a Sixth Amendment speedy trial analysis. If respondents have any constitutional claim that they were deprived of a fair trial as a result of their administrative detention, that claim should be evaluated under due process criteria, rather than under a right to counsel analysis that is so clearly inconsistent with this Court's decisions.

3. The court of appeals also erred in concluding that dismissal of the indictments was the appropriate remedy in the absence of any specific showing of prejudice resulting from the failure to appoint counsel during respondents' stay in administrative detention. Dismissal of the indictment is a drastic remedy that is rarely appropriate, even in the case of constitutional violations. See, e.g., *United States v. Blue*, 384 U.S. 251, 255 (1966). This Court stressed in *United States v. Morrison*, *supra*, 449 U.S. at 364-365 (footnote omitted), that "remedies should be tailored to the injury suffered" and that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation [of the right to counsel] may have been deliberate." The Court pointed out in *Morrison* that in right to counsel cases the proper approach is to identify and neutralize any taint "by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Id.* at 365.

Here the court of appeals made little effort to determine whether respondents had suffered actual and significant prejudice as a result of the failure to appoint counsel during the period of administrative detention. To the extent the court attempted to identify prejudice, it relied on respondents' allegations and on the pretrial conclusions of the district court that had dismissed the indictment in the *Mills* case—conclusions that a panel of the court of appeals subsequently had found to be with-

out foundation (see App. B, *infra*, 30a-40a). The court of appeals made no attempt to analyze whether these predictions of prejudice had been borne out by events at trial. In fact, the court concluded that in the case of inmate-suspects who are held in administrative detention during the preindictment period it is proper to "presume prejudice because ordinarily it will be impossible adequately either to prove or refute its existence" (App. A, *infra*, 22a). The court of appeals suggested that its holding was in line with *Morrison* because, in the court's view, the "potential for substantial prejudice" resulting from the failure to appoint counsel during administrative detention could not be cured by an after the fact remedy (App. A, *infra*, 21a, 22a). But *Morrison* surely requires more than the potential for prejudice as a prerequisite to dismissal of the indictment.

This Court has made clear that courts must make case by case evaluations to determine whether constitutional violations have resulted in actual prejudice and whether such prejudice is so great that dismissal of the indictment is warranted, even when this is not an easy task. In *United States v. Marion*, *supra*, 404 U.S. at 325-326, the Court stressed that the possibility of prejudice in the form of dimmed memories, inaccessible witnesses, and lost evidence resulting from preindictment delay is not alone sufficient to establish that a defendant will be deprived of a fair trial and to justify the drastic remedy of barring the prosecution. See also *United States v. Lovasco*, *supra*, 431 U.S. at 796-797. This requirement of a concrete showing of prejudice applies even where the prosecutor has deliberately and unfairly delayed indictment in an effort to secure a tactical advantage at trial. *Id.* at 790.¹⁹ Respondents' allegations of prejudice are

¹⁹ More recently, in *United States v. Valenzuela-Bernal*, No. 81-450 (July 2, 1982), the Court required some showing of prejudice even in a case in which (unlike this case) the government had acted to remove from the reach of process individuals it knew to be percipient witnesses. The Court held that, under either the

quite similar to the kind that courts regularly evaluate in passing upon claims of improper preindictment delay, and we find it impossible to understand why the court of appeals deemed it necessary to dispense with such an inquiry in this context.

We also take issue with the court of appeals' conclusion (App. A, *infra*, 22a) that the circumstances of prison cases normally make it impossible to determine whether prejudice has resulted from the failure to appoint counsel during administrative detention. In fact, in view of the controlled conditions of prison life (resulting in a limited number of potential witnesses and availability of inmate rosters, photographs, and other records), it should usually be less difficult than in other cases to determine whether preparation of an inmate's defense has been impaired. Moreover, at least in federal prison cases, a court should consider the fact that those wrongly suspected of crime are not without recourse. The Bureau of Prisons provides staff representatives to help inmates investigate and present evidence in connection with prison disciplinary hearings. Under 28 C.F.R. 541.15, the staff representative "shall be available to assist the inmate if the inmate desires by speaking to witnesses and by presenting favorable evidence to the [institution discipline committee] on the merits of the charge(s) or in extenuation or mitigation of the charge(s)." Thus, inmates normally will have had access to the sort of assistance with which the

Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment, a defendant cannot establish that the government's deportation of witnesses has resulted in deprivation of a fair trial "unless there is some explanation of how their testimony would have been favorable and material" (slip op. 14). The Court stressed in *Valenzuela-Bernal* that determinations of the materiality of a missing witness's testimony often would be best made in light of all the evidence adduced at trial (*id.* at 15). See also *United States v. MacDonald*, 435 U.S. 850, 858-859 (1978) (noting that a claim of prejudice from violation of the right to a speedy trial is "best considered only after the relevant facts have been developed at trial").

court of appeals was concerned.²⁰ Moreover, as in any case, the absence of some potential witnesses may or may not make a difference, depending on the defense theory and on the ability to locate other witnesses, as well as on the strength of the prosecution's case. If the testimony of allegedly missing witnesses would have been cumulative to that of witnesses who have been located, the absence of the former does not warrant the drastic remedy of barring prosecution altogether.²¹ Finally, in evaluating prejudice in cases like this one, a court should take into account the fact that the prosecution also faces significant investigative hurdles in the case of prison crime (see App. A, *infra*, 11a), including difficulty in obtaining cooperation from inmate-witnesses and a shortage of witnesses whom a jury is likely to find credible. Moreover, every defendant has the ultimate protection of the prosecution's burden of proving guilt beyond a reasonable doubt.

Here, no substantial basis exists for concluding that the failure to appoint counsel during administrative detention deprived respondents of a fair trial. Respondents' appointed counsel conducted extensive investigation and presented "defenses of uncommon quality and vigor" (App. A, *infra*, 28a). At trial, the *Gouveia* respondents presented 34 witnesses, including 14 alibi witnesses, while the *Mills* respondents presented 42 witnesses, including

²⁰ The record in this case indicates (Mills C.R. No. 59, Mills Declaration at 28) that respondent Mills refused the offer of assistance of a staff representative; it is unclear whether the other respondents took advantage of such assistance.

²¹ Other factors also might indicate that a defendant has not been deprived of a fair trial as a result of the failure to appoint counsel during administrative detention. The most obvious would be acquittal; here, the *Gouveia* respondents' co-defendant Flores was acquitted, although he had been in administrative detention or at another institution during most of the preindictment period and made claims of prejudice similar to those made by respondents (see pages 2-3, 5, *supra*; C.R. No. 33 at 15, 16, 18-19).

six alibi witnesses. See pages 6, 11, *supra*. Although the *Mills* respondents complained that they were prejudiced by deterioration of physical evidence, they presented several expert witnesses who testified concerning that evidence. See page 11, *supra*. Several of the *Gouveia* respondents were not placed in administrative detention until approximately three weeks after the murder occurred; thus, they had some opportunity to investigate and prepare defenses during the weeks immediately following the offense—presumably the most important time for purposes of investigation.²² In such circumstances, the court of appeals should have analyzed the respondents' allegations of prejudice in light of the evidence presented at trial, rather than simply presuming that there would be prejudice in virtually every case involving the failure to appoint counsel during administrative detention.²³

4. The decision below will have significant practical consequences for the administration of federal and state prisons and for the criminal justice process in the Ninth Circuit. Under the decision, after an indigent inmate has been in administrative detention for 90 days following commission of a criminal offense, prison officials must choose between providing counsel for the inmate and returning him to the general prison population. As a practical matter, appointment of counsel would require prison officials and the court to set up new administrative pro-

²² Respondents Ramirez and Segura were not placed in administrative detention until December 4, 1978—three weeks after the murder of Trejo; respondents Gouveia and Reynoso were released from detention and returned to the general prison population in the period between November 22 and December 4, 1978. See pages 2-3, *supra*. The record contains no evidence that the respondents took advantage of these periods to conduct investigations.

²³ In addition, as the dissenters pointed out below (App. A, *infra*, 28a-29a), there are remedies short of dismissal of the indictment (including cross-examination, argument to the jury, and instructions concerning missing evidence) that can mitigate prejudice in cases like this one.

cedures.²⁴ In addition, prison officials would have to make arrangements to ensure that preindictment investigation of the type envisioned by the court of appeals could be conducted consistently with the maintenance of order in the institution and with the need to avoid interference with ongoing FBI investigations.

The alternative of releasing inmate-suspects into the general prison population after 90 days of administrative detention would be unacceptable in many instances. As noted above, prison officials have responsibilities to preserve order and to protect the integrity of ongoing investigations. These responsibilities normally will require continued administrative detention of inmates pending investigation of serious crimes. While there may occasionally be useful investigation that an inmate could conduct to vindicate his innocence, prison officials would be derelict in their duties if they failed to take into account the fact that often such "investigations" are likely to consist of intimidating prospective witnesses and suborning perjury. See, e.g., *United States v. Castillo*, 615 F.2d 878, 885 (9th Cir. 1980).

The decision below is of particular concern if it is read to prohibit transfer of an inmate-suspect to a higher security institution following commission of a criminal offense.²⁵ Transfer is an important administra-

²⁴ The court of appeals spoke in terms of prison officials appointing counsel for indigent inmates (App. A, *infra*, 17a). In fact, however, the Bureau of Prisons itself has neither statutory authority nor a source of funding with which to appoint counsel. However, if the court of appeals' recognition of a Sixth Amendment right to counsel in this context is correct, it appears that district courts could appoint counsel pursuant to the Criminal Justice Act of 1964, 18 U.S.C. 3006A(a), on the motion of an inmate or the Bureau of Prisons. Here respondents did not apply to a district court for appointment of counsel.

²⁵ Transfer of an inmate to another institution presumably would interfere with his ability to investigate and prepare a defense even more than would a continuation of administrative detention. Indeed, even if counsel were appointed, it is unclear whether the

tive tool for prison officials who are responsible for inmates who cannot safely be returned to the general population. See, e.g., *Olim v. Wakinekona*, No. 81-1581 (Apr. 26, 1983); *Howe v. Smith*, 452 U.S. 473 (1981); *Meachum v. Fano*, 427 U.S. 215 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976). The Bureau of Prisons has informed us that during a recent 12-month period approximately 400 inmates in detention following suspected commission of an indictable offense were transferred before being returned to the general prison population. Of the 400, over 70 were transferred from prisons located within the Ninth Circuit. If as a result of the decision below prison authorities may not transfer inmates found to have participated in a prison murder, there would be a significant threat to the security of federal prisons.

Moreover, it is not at all clear that appointment of counsel during administrative detention would contribute as significantly to an inmate's investigation or preparation of a defense as the court of appeals presumed. Bureau of Prisons officials have informed us that they are unaware of any instances in which retained counsel have sought access to a prison to conduct an investigation prior to indictment. Of course, security concerns would make it virtually impossible to allow counsel unsupervised access to the premises of a prison or free rein to seek out possible witnesses from among the inmates. Moreover, inmates may obtain the assistance of a staff representative in connection with disciplinary proceedings. See pages 24-25, *supra*. Thus, an inmate who is sincerely interested in exonerating himself already has access to an individual who is responsible for investigation, interview-

court of appeals' decision would permit a transfer (e.g., from California to the Marion Penitentiary in Illinois), since the result could be either that the inmate and his counsel would be too far apart to confer conveniently (if counsel were located in California), or that both would be located a considerable distance from the scene of the crime (if counsel were located in Illinois).

ing witnesses, and presenting a defense on behalf of the inmate. See 28 C.F.R. 541.15(b).

There are also significant practical concerns arising from the court of appeals' conclusion, without analysis of actual prejudice or alternative remedies, that the appropriate remedy in cases like this one is dismissal of the indictment. The two brutal murders in this case are typical of the violent prison crimes that have become a serious threat to the security of both federal and state institutions in recent years. See, e.g., App. B, *infra*, 31a (noting information that Lompoc inmates committed at least 14 homicides in 1980); *Brothers in Blood: Prison Gangs Formed by Racial Groups Pose Big Problem in West*, Wall St. J., May 11, 1983, § 1, at 1, col. 1.

If the decision below stands, the result will be that many especially dangerous individuals who have committed serious institution crimes will escape criminal penalties entirely. On a nationwide basis, the Bureau of Prisons has identified over 200 pending prosecutions for serious institution crimes (including 66 in the Ninth Circuit). The Bureau believes that many of the defendants in these prosecutions were held in disciplinary segregation and/or administrative detention for more than 90 days following the offense and prior to indictment; thus, indictments against them would apparently have to be dismissed if the decision below is correct. And, of course, the Ninth Circuit's novel rule casts a pall over the viability of innumerable state prosecutions for prison crimes. In view of these consequences, and in light of the practical problems federal and state prison officials will face as a result of the decision below, it would be unduly burdensome if resolution of the questions raised by the decision below were postponed. Thus, review of the decision below is plainly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-1271, 81-1272, 81-1273,
81-1274, 82-1206, 82-1278

DC Nos. CR 80-535-3-MML, CR 80-535-2-MML,
CR 80-535-5-MML, CR 80-535-1-MML,
CR 80-278-1-WPG, CR 80-278-2-WPG

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WILLIAM GOUVEIA, ROBERT RAMIREZ, PHILIP SEGURA,
ADOLPHO REYNOSO, ROBERT EUGENE MILLS,
RICHARD RAYMOND PIERCE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California
Malcolm M. Lucas, District Judge, Presiding
William P. Gray, District Judge, Presiding
Argued and Submitted December 15, 1982

Before: BROWNING, Chief Judge, WRIGHT, CHOY,
SNEED, KENNEDY, ANDERSON, HUG, SCHROE-
DER, POOLE, FERGUSON, and NELSON, Cir-
cuit Judges

SNEED, Circuit Judge:

[Filed Apr. 26, 1983]

Appellants Reynoso, Segura, Ramirez, and Gouveia have been convicted of murdering a fellow inmate at the Federal Correctional Institution in Lompoc, California (FCI-Lompoc). Appellants Mills and Pierce, also inmates at FCI-Lompoc, were convicted of a later murder at the same institution. Each appellant was isolated in administrative detention without the benefit of counsel for an extended period prior to being indicted. We consolidated these cases for en banc consideration of whether, under any circumstances, a federal prisoner suspected of committing a crime while in prison and placed in administrative detention is constitutionally entitled to an attorney prior to indictment.

I.

FACTS

A. *Appellants Reynoso, Segura, Ramirez, and Gouveia*

Thomas Trejo, an inmate at FCI-Lompoc, was stabbed to death on November 11, 1978. The Bureau of Prisons instituted an administrative investigation and on December 4, 1978, the Unit Disciplinary Committee and the Institutional Disciplinary Committee at FCI-Lompoc conducted administrative hearings to consider appellants' involvement in the killing. Appellants Ramirez and Reynoso requested appointment of counsel at the hearings, but their requests were denied. Prison officials found that appellants had killed Trejo and appellants were placed in isolation in the administrative detention unit (ADU) at FCI-Lompoc.

Appellants remained in ADU continuously until July of 1980, a period of more than 19 months.

While in ADU appellants were confined in individual cells except for short daily exercise periods; they were denied access to the general prison population and their participation in various prison programs was curtailed. Appellants did have access to legal materials, they had visitation rights, and they could make unmonitored phone calls. During this period appellants were not appointed counsel though their opportunity to hire private counsel was not restricted.

The Federal Bureau of Investigation conducted its own investigation into Trejo's murder, concurrent with the Bureau of Prison's internal investigation. In January 1979, the United States Attorney's Office was officially informed of the FBI investigation and a prosecutive file was opened. In March 1979, a grand jury investigation commenced. Appellants Reynoso, Ramirez, and Segura appeared before the grand jury to provide fingerprint exemplars and they were appointed counsel for purposes of that appearance.

On June 17, 1980, the grand jury indicted appellants on charges of first degree murder and conspiracy to commit murder in violation of 18 U.S.C. §§ 1111, 1117. On July 14, 1980, appellants were arraigned in federal court and the magistrate appointed counsel. Appellants' first trial commenced on September 16, 1980, but it resulted in a mistrial when the jury was unable to reach a verdict. A second trial began on February 17, 1981, and all four appellants were convicted on both counts. They were each sentenced to consecutive life and ninety-nine year terms of imprisonment.

B. Appellants Mills and Pierce

Thomas Hall, an inmate at FCI-Lompoc, was stabbed to death on August 22, 1979. Appellants

Mills and Pierce were questioned and given physical examinations by FBI agents and prison officials. They were placed in ADU on the day following the murder. An internal prison investigation culminated in a hearing before the Institutional Disciplinary Committee on September 13, 1979. Appellants were adjudged guilty of killing inmate Hall and, in accordance with prison regulations, were ordered to forfeit all accumulated "good time."

Mills and Pierce remained isolated in ADU for eight months. They were not permitted to communicate with inmates in the general population or other potential witnesses, to discuss their case with anyone other than prison officials, or to be examined by their own physicians or experts. During this time appellants repeatedly asked to speak with counsel but their requests were denied. On March 27, 1980, Mills and Pierce were indicted under 18 U.S.C. §§ 1111, 1792, for first degree murder of a federal inmate and for conveyance of a weapon in prison. Pierce was indicted also for assault under 18 U.S.C. § 113(c). On April 21, 1980, appellants were arraigned, appointed counsel, and released from ADU.

The district court dismissed the indictments on the grounds that appellants had been denied their constitutional rights to speedy trial and assistance of counsel. It concluded that the government failed to justify its delay in seeking the indictments or in bringing defendants to trial, or to explain why Mills and Pierce remained in isolation for eight months without assistance of counsel. It found that they had been irreparably prejudiced because of the dimming of memories of exonerating witnesses, the loss of witnesses, and the deterioration of physical evidence.

On appeal this court reversed the dismissal, holding that the Sixth Amendment right to counsel and a

speedy trial did not attach until appellants were indicted. *United States v. Mills*, 641 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981). We further held that the preindictment delay did not deny appellants due process because appellants could not demonstrate actual prejudice resulting from the delay. In January 1982, appellants were brought to trial, convicted on all counts, and sentenced to life imprisonment. On appellants' petition, we consolidated appellants' post-conviction appeal with *United States v. Gouveia* for reconsideration by the court sitting en banc of whether appellants were denied their constitutional right to counsel during the preindictment period in which they were isolated in ADU.

II.

THE SIXTH AMENDMENT RIGHT TO COUNSEL

Appellants claim, *inter alia*, that lengthy preindictment isolation without assistance of counsel irrevocably prejudiced their ability to prepare an effective defense, and thus unconstitutionally deprived them of their right to counsel and to a fair trial in contravention of the Fifth, Sixth, and Eighth Amendments. Because we conclude that appellants were denied their Sixth Amendment right to counsel, we do not reach the Fifth and Eighth Amendment claims.

The Sixth Amendment guarantees that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This guarantee is meant to assure fairness in the adversary criminal process. *United States v. Morrison*, 449 U.S. 361, 364 (1981). The right to counsel is primarily a trial right. It has been held to

attach at any point in the prosecution where an attorney is necessary to preserve the accused's right to a fair trial or to ensure that the accused will receive effective assistance of counsel at the trial itself. *See id.* at 364; *United States v. Wade*, 388 U.S. 218, 225-27 (1967).

There is no dispute that Sixth Amendment guarantees are as applicable to the prosecution of prison crimes as to any other criminal prosecution. *See, e.g., United States v. Clardy*, 540 F.2d 439 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976); *United States v. Blevins*, 593 F.2d 646 (5th Cir. 1979). Thus appellants were appointed counsel in their arraignments. *See Powell v. Alabama*, 287 U.S. 45 (1932). The issue before us is a narrower one though; it is a question of first impression that is unique to prison crime. We must decide whether the isolation of appellants in administrative detention pending investigation and trial obligated prison officials to provide counsel at any time prior to appellants' indictments.

Each appellant has established that while being held in administrative detention he lacked the means necessary to hire an attorney. This is significant because inmates held in administrative detention are not denied access to counsel. Though isolated from the general prison population, they have the opportunity to make unmonitored phone calls if they wish to talk to an attorney and they have visitation rights. 28 C.F.R. §§ 541.19(c)(10), 541.20(d) (1982). Thus, it is only indigent inmates, those who are without the means to retain counsel on their own, whose constitutional right to the assistance of counsel is before us today.

The government first argues that the appointment of counsel at arraignment fully satisfied appellants'

constitutional rights to assistance of counsel. This position is based on *Kirby v. Illinois*, 406 U.S. 682 (1972), where the Supreme Court held that the Sixth Amendment right to counsel attaches when formal judicial proceedings are initiated by way of indictment, information, arraignment, or preliminary hearing. See also *United States v. Bagley*, 641 F.2d 1235 (9th Cir.), cert. denied, 454 U.S. 942 (1981); *United States v. Zazzara*, 626 F.2d 135 (9th Cir. 1980). The Court in *Kirby* reasoned that until adversary proceedings are initiated the suspect is not "accused" and no criminal prosecution is underway. Thus, by its own terms, the Sixth Amendment does not require that counsel be present at a preindictment identification proceeding. 406 U.S. at 689-90.

We, of course, are bound by the Supreme Court's decision in *Kirby*. However, *Kirby* is not a prison case. The point of "accusation" may be different for the prosecution of prison crimes, where the suspect is already incarcerated and subject to the discretion and discipline of federal authorities. The Supreme Court itself has recognized that the point of "accusation" for one purpose of the Sixth Amendment can vary from that of another. Thus, an arrest will trigger the Sixth Amendment right to a speedy trial even if no formal indictment has been brought. *United States v. Marion*, 404 U.S. 307, 320 (1971). That is because the arrest is a public act that seriously interferes with the suspect's liberty in a way that the speedy trial provision is designed to mitigate. See *id.* at 320.

No Supreme Court case limiting the right to an attorney to post-indictment proceedings confronts the unique situation of a prisoner held in administrative detention. *Kirby* and cases interpreting it are based

on the following assumption: "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice." 406 U.S. at 689. And so it is, at least when non-inmates are accused of crime. But appellants were detained in solitary confinement for up to twenty months while the government prepared to prosecute them. Thus, the assumption in *Kirby*—that the indictment is the tool by which the suspect first is brought face-to-face with government prosecutorial forces—is not present in this case in precisely the same manner. Prior to indictment appellants have confronted the prison disciplinary processes with the result that each was found to be a murderer for which each was subjected to prison discipline.

The Supreme Court's opinion in *Marion* provides a guide to follow in determining whether a particular governmental act constitutes a criminal accusation for the Sixth Amendment purposes. It shows that an accusation depends in part on whether the government's conduct in question has the particular consequences for a suspect that the Sixth Amendment guarantee is designed to prevent. Or, stated another way, whether a person stands accused can only be determined from the totality of circumstances. See *Escobedo v. Illinois*, 378 U.S. 478, 485-86 (1964). It is true that a person outside prison is usually not accused until an indictment has been issued. But see *United States ex rel. Robinson v. Zelker*, 468 F.2d 159 (2d Cir. 1972), cert. denied, 411 U.S. 939 (1973) (holding that arrest warrant initiated state prosecution for *Kirby* purposes because New York law equates the issuance of an arrest warrant on probable cause with the filing of an indictment); *Common-*

wealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974) (same). But appellants were subject to the discretion of government officials in a way that individuals outside prison are not. To determine whether prison disciplinary proceedings which culminate in administrative detention can in any circumstances constitute a criminal accusation, it is necessary that we examine its function and its impact on detainees suspected of a crime.

We note at the beginning that administrative detention is a "substantial deprivation of liberty." *Wolff v. McDonnell*, 418 U.S. 539, 594 (1974) (Douglas, J., dissenting). As such, certain procedural guarantees—established both by judicial application of the Due Process Clause and by prison regulations—govern its use. See *Hewitt v. Helms*, 103 S. Ct. 864 (1983). Appellants do not challenge the legitimacy of administrative detention in general or its appropriateness in the instant case. Rather, they contend that the removal of a prisoner to administrative detention because he is suspected of a crime is an accusation for the purpose of entitling him to appointed counsel provided at government expense. The government of course disagrees.

Administrative detention is imposed primarily in two situations. The first involves internal prison disciplinary proceedings. An inmate suspected of committing a crime in a Federal Correctional Institution first faces disciplinary action by prison officials. Virtually any state or federal crime is also a violation of prison regulations. See 28 C.F.R. § 541.11 (1982). And an inmate who is adjudged guilty of breaching prison regulations is subject to disciplinary penalties that range from temporary loss of privileges, or loss of built up "good time," to isolation in disciplinary segregation for up to sixty days.

It is well established that prison disciplinary proceedings are not "criminal prosecutions" as that term is used in the Sixth Amendment. *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Wolff v. McDonnell*, 418 U.S. 539 (1974). Inmates suspected of breaking prison rules must be given a hearing before the Institutional Disciplinary Committee but the full panoply of rights due a defendant in a criminal trial does not apply in disciplinary hearings. *Wolff v. McDonnell*, 418 U.S. at 556. Specifically, an inmate has no right to have retained or appointed counsel present at a disciplinary hearing. *Id.* at 570. Likewise, there is no right to counsel by reason of pre-hearing detention or detention imposed as a disciplinary measure.

Besides its disciplinary function isolation is imposed when necessary for security purposes. Prison regulations authorize the Warden to order temporary isolation in certain specified situations when an inmate's continued presence in the general prison population poses a serious threat to safety, security, or order. See 28 C.F.R. § 541.20 (1982). It is perhaps the principle remedy available to prison officials when crime or other disturbances threaten the prison environment.

Importantly, appellants do not contend that temporary isolation carries with it a right to appointed counsel when the detention is imposed for security reasons. Nor could they. Prison officials are charged with maintaining order and ensuring the safety of inmates and prison employees. Serious crimes compound the difficulty of this responsibility in what is necessarily a volatile environment. Temporary isolation, imposed to defuse a potentially explosive confrontation and to protect inmates from harm, is part

of the correctional process. It is unrelated to any subsequent criminal prosecution.

Administrative detention at times serves an accusatory function, however. The Warden can isolate inmates "pending investigation or trial for a criminal act." 28 C.F.R. § 451.20(a)(3) (1982). In this situation detention is related to a subsequent prosecution. It furthers many of the same governmental interests served by an arrest outside the prison walls. The Supreme Court has recently recognized that confining inmates to administrative detention pending completion of the investigation of disciplinary charges serves the important need of investigative officers to protect witnesses and evidence, to facilitate an effective investigation, and to prevent further criminal activity by the suspect. *Hewitt v. Helms*, 103 S. Ct. 864 (1983). These interests are important for nonprison crimes and in that situation they lead to an arrest at the earliest possible point. But they are important also for serious prison crimes where the insular character of the inmate population creates unique investigatory and evidentiary hurdles for the prosecution and leaves potential witnesses particularly vulnerable to retribution and coercion. The critical fact is that for prison crimes the governmental interests that dictate the isolation of suspects do not lead to an arrest, nor prompt the early initiation of formal judicial proceedings, but rather cause the isolation of suspected inmates in administrative detention for what can be an indeterminate period.

The characterization of administrative detention pending trial as an "accusation" is buttressed when we consider the effect of isolation on the inmate's ability to defend the criminal charges. We note first that an inmate suspected of crime must overcome investigatory obstacles even greater than those facing

the prosecution. The transient nature of the federal prison population makes difficult even the identification of potential witnesses. Combined with a hesitation on the part of potential inmate witnesses to cooperate this imposes a serious impediment to the preparation of an inmate's defense.

Thus early access to the general prison population is critical to the suspect's ability to prepare and preserve a defense. Yet during the time that appellants were in ADU only the government was free to conduct an investigation, contact witnesses, and preserve evidence. Isolated in solitary confinement appellants were unable to confer with potential defense witnesses, or even to keep track of their whereabouts. Cf. *Smith v. Hoey*, 393 U.S. 374, 378-83 (1969) (speedy trial right protects prisoners who are subject to criminal prosecution in another jurisdiction). Appellants were powerless to exert their own efforts to mitigate the erosive effects of the passage of time.

The effect of administrative detention in cases such as these is to deny an inmate the opportunity to take steps to preserve his or her own defense. This distinguishes appellants from suspects outside of prison who have not yet been arrested or indicted. The position of appellants while being held in administrative detention pending investigation of their crimes more resembles that of a suspect outside of prison who has been arrested and detained than that of an outside suspect who has been neither arrested nor detained. Unconvicted suspects confined within prison walls suffer a serious disability.

The government correctly points out that outside of prison it is not an arrest that triggers the right to counsel but rather the initiation of adversary judicial proceedings. *Kirby v. Illinois*, 406 U.S. at 689; *United States v. Coades*, 468 F.2d 1061 (3d Cir. 1972). This fact merely illustrates the need for a

rule designed for prison crimes, however. Upon arrest a defendant must be arraigned "without unnecessary delay." Fed. R. Crim. P. 5(a). At that point the accused is guaranteed the assistance of counsel. No such procedural guarantees operate in prison, where the suspect may be isolated throughout the pendency of the government's investigation.

The Supreme Court long ago recognized the importance of counsel during the "critical period of the proceedings . . . when consultation, thoroughgoing investigation and preparation [are] vitally important." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). In *Powell*, the deprivation occurred during the one day that passed between the defendant's arraignment and his trial. In the instant case, by contrast, the government was able to delay appellants' arraignments for up to twenty months, thereby effectively suspending the right to counsel until its case was built. This comparison serves to illustrate that an inmate who is suspected of a prison crime is in a unique position viz-a-viz the prosecution. Formal charges need not be brought until the government is ready for trial because the suspect can be isolated without being arrested. To insist that an inmate is not "accused" until formal charges are initiated is to ignore reality.

The government, nonetheless, denies that isolation pending trial can ever be an accusation. First, it cites a line of circuit cases which holds that administrative detention is not an arrest for purposes of the Sixth Amendment speedy trial right. Second, it emphasizes the administrative barriers that exist between prison administrators and the prosecutorial arm of the federal government, arguing that detention is entirely within the province of prison officials. We find neither argument to be persuasive.

This court has held that administrative detention is not an "arrest" for speedy trial purposes. *United States v. Clardy*, 540 F.2d 439, 441 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976); *accord*, *United States v. Blevins*, 593 F.2d 646 (5th Cir. 1979); *United States v. Duke*, 527 F.2d 386 (5th Cir.), *cert. denied*, 426 U.S. 952 (1976). In *Clardy* we based our decision on the conclusion that administrative detention does not implicate the major evils identified in *United States v. Marion* as those protected against by the speedy trial guarantee. 540 F.2d at 441. The evil that *Marion* attributed to an arrest was that it seriously interferes with defendant's liberty and therefore "may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." 404 U.S. at 320. We held in *Clardy* only that administrative detention does not cause these consequences to the extent that an arrest does and therefore an inmate's detention does not start the speedy trial clock.

We do not question today that *Clardy* was correctly decided. It is simply inapposite to the question before us. Unlike the speedy trial right the assistance of counsel is constitutionally guaranteed not to minimize pretrial interference with defendant's liberty but because of the belief that without it, there can be no assurance that defendant will receive a fair trial. "The plain wording of . . . [the assistance of counsel guarantee] encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" *United States v. Wade*, 388 U.S. at 225.

The government also asserts that administrative detention cannot be accusatory because prison officials act on their own accord, and not as an arm of the prosecution, when inmates are placed in adminis-

trative detention. We need not inquire into the extent of cooperation between prison officials, the FBI, and the United States Attorney, however, because the relationship is of little consequence. Administrative detention is a "public act." See *United States v. Marion*, 404 U.S. at 320. When detention is ordered as a disciplinary measure or to prevent disorder it is indeed a matter of internal prison administration. But when used to isolate an inmate pending trial both its purpose and effect is accusatory. It is not which arm of government orders detention but for what purpose and to what effect.

It is, therefore, clear that the administrative detention of an indigent inmate who is suspected of a crime does, under certain circumstances, give rise to the right to appointed counsel. The question is what are those circumstances. In prison there is no automatic device that triggers the right. It should not arise immediately when detention begins because there are substantial administrative and disciplinary concerns that justify detention but are unrelated to a criminal prosecution. And, as already pointed out, it should not be automatically postponed until indictment. The duty to appoint counsel "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Powell v. Alabama*, 287 U.S. at 71. By necessity then we must fashion a rule which preserves the right to effective assistance of counsel without impairing the authority of prison officials to carry out their administrative responsibilities.

III.

APPELLANTS WERE DENIED THEIR CONSTITUTIONAL RIGHT TO ASSISTANCE OF COUNSEL

Therefore, we must determine, first, at what point administrative detention gives an indigent federal inmate a right to appointed counsel and, second, whether appellants were held beyond that point. Inasmuch as the detention of an inmate suspect serves a variety of goals the reasons for placing an inmate in detention will vary depending on the circumstances. Indeed, appellants no doubt were detained for a number of legitimate reasons.

However, prison regulations specify that administrative detention is "to be used only for a short period of time except where an inmate needs long-term protection." 28 C.F.R. § 541.20(c) (1982). Even when imposed for an inmate's protection, detention is limited to ninety days in all but the rarest of circumstances. *Id.* § 541.21(c). Therefore, the longer an inmate is isolated following the commission of a crime the more the detention takes the form of an "accusation" and the less it resembles either detention for protection of the inmate or for other purposes.

Likewise, the longer the inmate is held the greater the need for counsel. That is because the right to counsel is primarily a trial right. It does not attach until necessary to assure that the accused will receive effective assistance of counsel at the trial itself. *United States v. Wade*, 388 U.S. at 225-27. Counsel can effectively ameliorate the adverse consequences of detention so long as the appointment comes within a reasonable time following the institution of admin-

istrative detention. This is the principle upon which we base our holding. Guided by it we hold that a prisoner, who is being held in isolation because of an impending investigation and indictment related to a serious crime, must be provided counsel, subject to the same conditions as are applicable to an indigent following indictment, after a reasonable time. If counsel is not so provided he must be released into the general prison population.

Current prison regulations provide a standard against which to measure a "reasonable time." The maximum stay in isolation for purposes of discipline even for serious crimes is ninety days. This period consists of thirty days pending a disciplinary hearing and sixty days of disciplinary segregation which does not exceed this length even for serious crimes. 28 C.F.R. § 541.11 (1982).

Isolation for more than ninety days, then, is necessarily for some purpose other than discipline. If an inmate is held after the maximum disciplinary period has expired he should be allowed to show that his detention, at least in part, is due to a pending investigation or trial for a criminal act. The inmate must ask for an attorney, establish indigency, and make a *prima facie* showing that one of the reasons for continued detention is the investigation of a felony. At that point prison officials must either refute the inmate's showing, appoint counsel, or release the inmate back into the general prison population.

The Supreme Court's decision in *Hewitt v. Helms*, *supra*, is compatible with this structure. That case holds that the state created a liberty interest, protected by the due process clause, by promulgating mandatory regulations that establish specific substantive predicates to administrative detention. 103 S.

Ct. at 871. Since regulations mandate that detention can be ordered only in specific circumstances, then the inmate has a concurrent due process right to ensure that the mandatory requisites in fact exist. Our case, while not governed by *Hewitt*, also utilizes regulations to provide specificity to a constitutional right. Federal prison regulations specify that administrative detention can only continue indefinitely where the detention is in contemplation of a criminal prosecution. In this way the prison regulations create a condition of confinement that embodies an accusation which generates a Sixth Amendment right to the assistance of counsel.

This structure achieves a proper balance of the interests of both prison officials and inmates suspected of crime. It does not require the government immediately to appoint counsel at the earliest stages of an investigation, before the adverse positions of government and inmate have solidified. See *Kirby v. Illinois*, 406 U.S. at 689. Nor does it involve counsel in disciplinary proceedings, thus reducing their utility as a means to further correctional goals. See *Wolff v. McDonnell*, 418 U.S. at 570. And it assures inmates who are suspected of crime, and who are ultimately prosecuted for that crime, that they will not be denied the effective assistance of counsel because of indigency. In this manner, equality with non-indigent inmates is preserved.

The rule also has the advantage of certainty. Whether an inmate is detained past ninety days in part as a pre-trial detainee can be determined from objective criteria. Prison regulations require the Warden to "prepare a memorandum detailing the reasons for placing an inmate in administrative detention, with a copy given to the inmate." 28

C.F.R. § 541.20(b) (1982). Moreover, the existence of an ongoing FBI investigation or a United States Attorney prosecutive file provides ample evidence that prosecution is pending. Once an inmate requests the assistance of an attorney and makes the necessary prima facie showing, the government bears the burden of establishing that prosecution is not a significant possibility. If unable or unwilling to make this showing the inmate must either be furnished counsel or be returned to the general prison population.

Turning finally to the facts of the instant case we find that appellants were denied their constitutional right to assistance of counsel. Each appellant remained in administrative detention long past the ninety days which we have held to constitute a reasonable period of administrative detention without counsel. The record shows numerous instances where one or more of appellants requested and was denied the assistance of counsel. And, lastly, the record compels the conclusion that each appellant was held in ADU at least in part as a result of pending criminal charges. The district court in the *Mills* case found that pre-trial detention was the *only* reason for the Mills' defendants prolonged stay in ADU. And the record shows that the *Gouveia* defendants were subject to a continuing FBI investigation throughout their stay in detention. Since appellants were held in detention for more than ninety days and one of the reasons for detention was to isolate appellants pending a criminal investigation and trial, they should have been appointed counsel.

IV.

THE PROPER REMEDY IS TO DISMISS
THE INDICTMENTS

In fashioning an appropriate remedy for appellants we are guided by the Supreme Court's recent decision in *United States v. Morrison*, 449 U.S. at 361, 364 (1981). There the Court stated that the remedy for Sixth Amendment deprivations "should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interest." *Id.* at 364. The correct approach is to identify the taint and devise a remedy that neutralizes the prejudice suffered so that the defendant is assured the effective assistance of counsel and a fair trial. *Id.* at 365.

The "taint" in the present case is that lengthy pre-indictment isolation without the assistance of counsel handicapped appellants' ability to defend themselves at trial. Prison crimes present suspects with unique investigatory and evidentiary obstacles. And, to repeat, the passage of time greatly exacerbates these difficulties. The length of delay in appointing counsel for appellants who were likewise denied the opportunity to take measures to preserve their own defense means that the critical initial stage of investigation was forever lost to appellants.

The district court in dismissing the indictments against appellants Mills and Pierce accurately characterized the prejudice suffered.

Specifically, defendants have been prejudiced by the dimming of memories of witnesses who could have substantiated their alibi; by the irrevocable loss of inmate witnesses known to the defendants only by prison "nicknames" now long-since transferred to other institutions or released from

custody altogether; and by the deterioration of physical evidence essential to corroborate the defendants' testimony and to rebut the evidence against them.

Mills' Excerpt of Record at 188. As the Supreme Court has put it, we must be "responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective." *United States v. Morrison*, 449 U.S. at 364. The district court was correct when it held that due to the belated appointment of counsel, ranging from 8 to 20 months after the murders were committed, and the transitory nature of the prison population, the opportunity for counsel to prepare the defense that is constitutionally guaranteed all persons accused of crime did not exist.

This case then is qualitatively different from the right to counsel cases in which the question is the right to counsel's presence at a pretrial confrontation between government and accused. When, for example, the government subjects a suspect to a custodial interrogation or a post-indictment lineup without the presence of counsel the prejudice suffered is both specific and curable. Suppression of the confession or evidence that is obtained or derived from the prohibited confrontation protects the right. *E.g.*, *United States v. Wade*, 388 U.S. 218 (1967); *Cahill v. Rushen*, 678 F.2d 791 (9th Cir. 1982). Here, however, government conduct has rendered counsel's assistance to appellants ineffective and the resulting harm is not capable of after the fact remedy. With respect to remedies appellants are in a position similar to suspects who are denied a speedy trial. See *Strunk v. United States*, 412 U.S. 434, 439 (1973); *Barker v. Wingo*, 407 U.S. 514, 522 (1972). Here, as there, the only certain remedy is to dismiss the indictments against them.

The government strenuously argues that appellants must demonstrate that they were prejudiced and that they have failed to present convincing evidence of specific prejudice. Even if this were true, it should not be dispositive. We, of course, do require definite, nonspeculative proof of actual prejudice before finding a due process violation from preindictment delay. See *United States v. Stone*, 633 F.2d 1272, 1274 (9th Cir. 1979); *United States v. Swacker*, 628 F.2d 1250, 1254 (9th Cir. 1979). The situation in these cases, however, is fundamentally different. Those accused in these cases were not free men as are usually those who complain about preindictment delay. They were not even a part of the general population of the prison. They were isolated in administrative detention. Under these circumstances we presume prejudice because ordinarily it will be impossible adequately either to prove or refute its existence. We must tip the scales in favor of the locked away accused in order to provide substance to the Sixth Amendment right to counsel. Dismissal of the indictments is appropriate where denial of assistance of counsel creates the potential of substantial prejudice. See *United States v. Morrison*, 449 U.S. at 365; *Coleman v. Alabama*, 399 U.S. 1, 7 (1970); *White v. Maryland*, 373 U.S. 59 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961).

Even without the presumption there is evidence that "substantial prejudice" may have occurred in the instant case. Each appellant asserts the loss of critical alibi witnesses either by their death, or by the transfer or release of witnesses known to appellants only by their nicknames. Moreover, it is significant that the government is unable to rebut convincingly appellants' showing of potential prejudice.

In essence the government argues that since appellants were able to produce a large number of "alibi" witnesses then no prejudice could have occurred. This contention is flawed for at least two reasons. First, it assumes that the quantity of witnesses always can overcome the absence of any particular defense witness. This is not true. Second, it ignores other prejudicial factors such as the dimming memories of witnesses whose testimony the defense had no opportunity to record at a time when events were fresh and the deterioration of physical evidence.

We do not preclude the possibility that under circumstances not presently foreseeable the government will be able to rebut convincingly the presumption of prejudice. But it has not done so here. The record convinces us that preindictment isolation without the assistance of counsel unconstitutionally obstructed the ability of appellants to defend themselves at trial. Thus we must overturn the convictions entered against each appellant.

Accordingly, we reverse the judgments of the courts below and remand with instructions to dismiss the indictments.

REVERSED AND REMANDED.

Nos. 81-1271/1272/1273/1274

UNITED STATES

v.

GOUVEIA, et al.

Nos. 81-1206/1278

UNITED STATES

v.

MILLS, et al.

[[Filed Apr. 26, 1983]

WRIGHT, Circuit Judge, dissenting, joined by Judges CHOY, KENNEDY, ANDERSON and POOLE

I respectfully dissent. Although I adhere to my position in *United States v. Mills*, 641 F.2d 785 (9th Cir. 1981), the majority's unprecedented expansion of the right to counsel requires that I comment further.

The Supreme Court has spoken with a clear and consistent voice regarding the point at which the right to counsel attaches. It attaches when adversary judicial criminal proceedings are initiated. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). By contrast, the speedy trial right may attach at other times, depending on threats to the liberty interests it protects. *United States v. Marion*, 404 U.S. 307, 320-321 (1971).

The majority today has confused these distinct Sixth Amendment guarantees. Relying on a *de facto* accusation concept derived from *Marion*, it rules that a prisoner stands accused if he is subjected to prolonged administrative detention pending investigation

of a prison crime. Although *Marion* concerned the speedy trial right, the majority concludes that the right to counsel attaches when an inmate is so detained, though formal proceedings have not begun.

The reasons for the majority's intertwining of these different Sixth Amendment rights are obvious. In *United States v. Clardy*, 540 F.2d 439, 441 (9th Cir.), cert. denied, 429 U.S. 963 (1976), we ruled that administrative detention did not bear the characteristics of a *de facto* arrest outside prison walls, and we refused to extend the speedy trial right to prisoners detained pending investigation of prison crimes.

Because *Clardy* forecloses a ruling that the speedy trial right applies to appellants, the majority has focused instead on the right to counsel. It insists that the assistance of counsel is necessary to combat the unique investigatory disadvantages faced by those in administrative detention. It points out that these appellants were powerless to interview witnesses or otherwise combat the "corrosive effects" of the passage of time while the government investigated.

The majority's focus on appellants' inability to interview witnesses underscores its misperception of the role played by the right to counsel. In *United States v. Ash*, 413 U.S. 300 (1973), the Court noted the historic expansion of the right to counsel. It ruled, however, that the right applied to trial-like confrontations and not to the prosecutor's investigations or interviews with witnesses. *Id.* at 312-320.

As the Court noted in *Kirby*, the right to counsel protects the defendant once he faces the prosecutorial forces of society and becomes immersed in the intricacies of the law. 406 U.S. at 689. Appellants may have suffered restrictions on their liberties and may

have been isolated from the government's investigations. Until indicted, however, they faced no confrontations for which the right to counsel was designed.

Just as the majority's interpretation of the right to counsel does not conform to precedent, its emphasis on the appellants' investigatory disadvantages does not conform to reality. I can readily envision situations in which suspects face similar obstacles. One convicted and imprisoned for a single crime may be under continuing investigation for other offenses. Another may have probation or parole revoked for renewed criminal activity. The government may incarcerate these suspects while it investigates criminal activities outside prison, for which they have not been arraigned or indicted. They are equally as "powerless" as appellants to interview witnesses or otherwise mitigate the effects of the passage of time.

Even free suspects often lack the investigatory advantages the majority attributes to them. Many law enforcement investigations are confidential and continue for months or years. Like appellants, the targets in such cases have limited knowledge or none about the investigations.

In any of these situations, indigent suspects might benefit from the assistance of counsel before indictment. As the Court noted in *Ash*, abuse or subversion of an investigation may occur at any point, but the extraordinary safeguard of the right to counsel is unnecessary to protect against such abuse. Suspects are amply protected by the "ethical responsibility" of the prosecutor and due process standards. *United States v. Ash*, 413 U.S. at 320-321.

The Court's rulings on administrative detention cannot buttress the majority's departure from the accepted view of the right to counsel. Although the ma-

Any presumption of prejudice is unwarranted and conflicts with the Court's holding in *Morrison*. The Court there noted that even the total denial of counsel might not warrant the presumption of prejudice and the drastic remedy of indictment dismissal. *Id.* at 364-365.

The appellants here were afforded defenses of uncommon quality and vigor. The *Gouveia* appellants alone presented 14 *alibi* witnesses. The majority's presumption of prejudice neglects the Court's teaching that the courts will dismiss indictments in response to claims that government conduct has rendered the assistance of counsel ineffective only if there is "demonstrable prejudice, or substantial threat thereof." *Id.* at 364-365.

The majority then declares that the appellants have proved prejudice. To show the effects of detention on appellants' defenses, the majority notes the absence of witnesses, dimming of memories, and deterioration of physical evidence.

These are factors commonly noted by those who complain of pre-indictment delay. They result from the passage of time rather than from ineffective advocacy. The applicable statutes of limitations and the Due Process Clause protect accused persons from the effects of any delay. *Marion*, 404 U.S. at 322-325.

To the extent that appellants argue that the government interfered actively with their access to witnesses, they have adequate remedies without resorting to the right to counsel. On a showing that the government has deliberately procured the absence of a material witness favorable to the defense, the indictment can be dismissed. *United States v. Valenzuela-Bernal*, 103 S. Ct. 34 (1982). On a showing that a witness peculiarly within the government's control

jority suggests that prosecutorial confrontations began at appellants' prison disciplinary hearings, the Court has ruled that such hearings do not implicate the right to counsel. *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974).

The majority's reliance on the Court's recent decision in *Hewitt v. Helms*, 103 S. Ct. 864 (1983), is misplaced. There the Court recognized that strong governmental interests supported the isolation of suspects in prison crimes. It pointed out that the decision to isolate suspects was peculiarly within the expertise of prison officials and might be necessary to protect witnesses during the investigations. *Id.* at 872-873. Although the Court ruled that state regulations could create a *liberty* interest in remaining in the general prison population, it decided that prisoners did not need the right to counsel to protect that interest. *Id.* at 871, 874.

Hewitt reaffirmed the notion that lawful incarceration of criminals is likely to restrict rather than expand their constitutional liberties. By its decision today, the majority has given suspects in prison crimes a right to counsel during government investigations, a right not available to suspects outside of prison. Rather than limiting the rights of prisoners, the majority has expanded them.

The inconsistencies in the majority's position are revealed further by its presumption of prejudice to appellants. The right to counsel is meant to ensure fairness in the adversary criminal process. *United States v. Morrison*, 449 U.S. 361, 364 (1981). Even if we assume that appellants were improperly denied counsel at an earlier stage, we must ask: were they given a fair trial?

Rather than focus on this question, the majority presumes prejudice and dismisses the indictments.

has not been produced, the defendants may request a missing witness instruction. If given, the instruction allows the inference that the witness would have testified unfavorably to the prosecution. See *United States v. Bramble*, 680 F.2d 590 (9th Cir. 1982).

Finally, the likelihood of exonerating testimony from absent witnesses is preeminently a factual matter for the jury's determination if the defendant chooses to advance the theory as part of his defense. Such contentions are legitimate parts of the defense case that guilt has not been proven beyond a reasonable doubt. All such defenses are fully adequate to meet the arguments presented by the appellants here without straining to grant relief by a new application of the right to counsel under the Sixth Amendment.

Appellants suffered no prejudice from the absence of counsel. By creating a right to counsel here, the majority has departed substantially from Supreme Court precedent. That departure compels me to suggest that review by that Court is indicated.

I would affirm the judgments.

APPENDIX B

**UNITED STATES COURT OF APPEALS
NINTH CIRCUIT**

No. 80-1540

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

**ROBERT EUGENE MILLS and
RICHARD RAYMOND PIERCE, DEFENDANTS-APPELLEES**

Argued and Submitted Feb. 5, 1981

Decided April 6, 1981

Rehearing and Rehearing En Banc
Denied June 25, 1981

As Amended July 7, 1981

Appeals from United States District Court
for the Central District of California

Before WRIGHT and NELSON, Circuit Judges,
and EAST, Senior United States District Judge.*

EUGENE A. WRIGHT, Circuit Judge:

On the government's appeal, two issues are presented: (1) was it error to dismiss two murder indictments for Fifth and Sixth Amendment violations, and (2) if so, should we direct the district court to vacate its order which compelled the government to produce statements of witnesses which it would not call at trial? We conclude: the dismissal of the in-

* Of the District of Oregon.

dictments is reversed and the district court is directed to vacate the discovery order.

I. FACTS

At oral argument we were told that inmates at the Federal Corrections Institution at Lompoc, California, committed at least 14 homicides in 1980. Thomas Hall, an inmate, was stabbed to death on August 22, 1979 and the appellees, Mills and Pierce, were believed to be implicated. Along with other inmates, they were questioned and given physical examinations by prison officials and FBI personnel.

On August 23, 1979, prison officials committed Mills and Pierce to the Administrative Detention Unit (ADU). Normal prison policy would have had them returned to the general inmate population or transferred to another institution within a few months. This was not done and they remained in segregation until they were arraigned on April 21, 1980.

During the eight months Mills and Pierce were in ADU, their activities were curtailed. They were not permitted to communicate with inmates not confined in ADU or potential non-inmate witnesses, to discuss their case with anyone other than prison officials, or to be examined by their own physicians or experts. Mills and Pierce had opportunities for exercise, education, and employment, albeit at a reduced level.

In the course of disciplinary hearings conducted by the Bureau of Prisons in the first few weeks after Hall's death, Mills and Pierce said they wished to consult with an attorney. This was denied.

The government indicted Mills and Pierce for murder on March 27, 1980. Trial was originally set for

June 30, 1980, but was continued to July 29, 1980 at Mills' and Pierce's request.

The trial court dismissed the indictments. It concluded the government failed to justify its delay in seeking the indictments or in bringing defendants to trial, or to explain why Mills and Pierce remained in isolation for eight months without assistance of counsel. It found that they had been irreparably prejudiced because of the dimming of memories of exonerating witnesses, the loss of witnesses and the deterioration of physical evidence.

II. DISCUSSION

A. *Sixth Amendment Right to a Speedy Trial*

We review the dismissal of an indictment for violation of the Sixth Amendment right to a speedy trial for abuse of discretion. See *United States v. Simmons*, 536 F.2d 827, 832 (9th Cir.), cert. denied, 429 U.S. 854, 97 S.Ct. 148, 50 L.Ed.2d 130 (1976).

The Sixth Amendment speedy trial provision applies when a defendant is "accused." *United States v. Lovasco*, 431 U.S. 783, 788-89, 97 S.Ct. 2044, 2047-48, 52 L.Ed. 752 (1977); *United States v. Marion*, 404 U.S. 307, 313, 92 S.Ct. 455, 459, 30 L.Ed.2d 468 (1971). That occurs with the filing of either a formal indictment or information "or else the actual restraints imposed by arrest or holding to answer a criminal charge" *Marion, supra*, 404 U.S. at 320, 92 S.Ct. at 463.

The trial court held Mills' and Pierce's Sixth Amendment rights were violated by the ten month delay between their detention in the ADU and the trial date. We disagree.

Administrative segregation by the prison board is not an "arrest" or "accusal" for speedy trial purposes. *United States v. Blevins*, 593 F.2d 646, 647 (5th Cir. 1979); *United States v. Clardy*, 540 F.2d 439, 441 (9th Cir.), *cert. denied*, 429 U.S. 963, 97 S.Ct. 391, 50 L.Ed.2d 331 (1976). In *Clardy*, this court held the identifying indicia of an arrest are absent in the prison setting.

The prison discipline did not focus public obloquy upon appellants, did not disrupt their "employment" or drain appellants' financial resources. In short, it was not a public act with public ramifications, but a private act. Actual physical restraint may have increased and free association diminished, but unless we were to say that imprisonment *ipso facto* is a continuing arrest, these criteria bear little weight in the peculiar context of a penal institution where the curtailment of liberty is the general rule, not the exception.

Id.

In *Clardy*, two inmates were confined in segregation after the stabbing of an inmate. *Id.* They were indicted and arraigned five months later, and their trial commenced seven months after segregation. *Id.* The court rejected their argument that such discipline was an "arrest" for speedy trial purposes. *Id.*

We find nothing in the present case that warrants a different result. The detention in the ADU was at the request of the Bureau of Prisons. The detention orders stated that Mills and Pierce were awaiting investigation of a violation of institutional regulations and investigation or trial for a criminal act, and that their continued presence in the general prison population "pose[d] a serious threat to life, property, self,

staff, other inmates, or to the security of the institution." There was no arrest or accusation until the grand jury indicted them on March 27, 1980. We agree with the Fifth Circuit that the *ad hoc* balancing test of *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 38 L.Ed.2d 101 (1972) does not apply. *Blevins, supra*.

B. Sixth Amendment Right to Counsel

The trial court also dismissed the indictment on the ground that Mills and Pierce were deprived of the Sixth Amendment right to counsel during the pre-indictment period.

The right to counsel attaches once adversary proceedings have commenced against a person. *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d at 246 (1964); *United States v. Bagley*, 641 F.2d 1235 at 1238 (9th Cir. 1981). Initiation of adversary proceedings occurs by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972). Therefore, unless a defendant is an "accused," the right to counsel is inapplicable. *United States v. Zazzara*, 626 F.2d 135, 138 (9th Cir. 1980).

Mills and Pierce were not arrested or accused until indicted in March 1980. Their Sixth Amendment claim to counsel during the pre-indictment period fails.

C. Right to Prepare a Defense

Mills and Pierce further support the dismissal of the indictment on the ground that the government denied their right to prepare a defense during the pre-indictment period.

We agree that the ability of an accused to prepare his defense is a fundamental aspect of our adversary system, *see Kinney v. Lenon*, 425 F.2d 209, 210 (9th Cir. 1970), but do not find that there was a deprivation here. This right, like the right to counsel, belongs to an *accused*. Mills and Pierce were not accused until indicted. They were then given the assistance of counsel and prepared their defense.

D. *Pre-Indictment Delay*

Seven months elapsed from the time Mills and Pierce were placed in the ADU until their indictment. The trial court found this pre-indictment delay deprived them of due process.

Pre-indictment delay may result in a denial in due process. *Lovasco, supra*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752, *United States v. Swacker*, 628 F.2d 1250, 1254 (9th Cir. 1980). To block a prosecution on this basis, a defendant must initially show actual prejudice resulting from the delay. *Swacker, supra*; *United States v. Stone*, 633 F.2d 1272, 1274 (9th Cir. 1979). The proof must be definite, not speculative. *Swacker, supra*; *United States v. Tousant*, 619 F.2d 810, 814 (9th Cir. 1980).

Prejudice is a necessary but not sufficient element of a due process claim.¹ *Lovasco, supra*; *United*

¹ This required showing of prejudice is the most crucial difference between the Sixth Amendment and the Due Process tests. The Supreme Court has held that an affirmative demonstration of prejudice is not necessary to prove a denial of the constitutional right to a speedy trial, but is only one of the factors to be considered. (citations omitted).

United States v. Henry, 615 F.2d 1223, 1232 n.12 (9th Cir. 1980).

States v. Henry, 615 F.2d 1223, 1232 (9th Cir. 1980). Once it is shown, the court must consider the reasons for and the length of the delay. *Swacker, supra*, 628 F.2d at 1254 n.4.

The trial court found Mills and Pierce were prejudiced by the dimming of memories of witnesses who allegedly could have supported their alibi, by the loss of witnesses known only by prison nicknames and now transferred to other facilities or released, and by the deterioration of physical evidence. It also concluded the delay was unreasonably long and unjustified since the government substantially concluded its investigation by October 1979.

Showing that witnesses have been lost or that evidence has become unavailable due to the delay suggests actual prejudice. *Tousant, supra*. But it is not enough to assert that potential witnesses have been lost. A defendant must identify the witnesses, relate the substance of their testimony, and efforts made to locate them. *Id.*

Mills and Pierce allege that identifying potential witnesses by prison nicknames, asserting that they have been unable to locate them, and that the witnesses' testimony would exonerate them is a sufficient showing. We disagree.

Prison nicknames do not erase the element of speculation. There was no showing that these nicknames were recorded and actual identities or the existence of the witnesses could not be associated with any certainty.

Even assuming nicknames are sufficient identification, the substance of the witnesses' testimony is no more than mere speculation. Mills alleges they would support his alibi that he was in the mess hall at the time of the murder. Pierce indicated they "might"

have information that would be of assistance in formulating a defense.

There is no evidence to support Mills' contentions other than his self-serving affidavit. The lack of the actual content of the witnesses' testimony prevents accurate evaluation of its benefit or detriment to him. See *United States v. Mays*, 549 F.2d 670, 679-80 (9th Cir. 1977).

As it stands now, a trier of fact might as well assume that the [witnesses] would have placed all of the blame on the defendants, as to assume that they would have exonerated them.

Id. at 680 (emphasis in original).

Pierce's claim that the missing witnesses might have been useful does not show actual prejudice. *United States v. West*, 607 F.2d 300, 304 (9th Cir. 1979).

Nor does the claim that the witnesses' memories have dimmed without proof of impairment constitute actual prejudice. *United States v. Rogers*, 639 F.2d 438 (8th Cir. 1981); *Mays*, *supra*.

Mills and Pierce also argue they were prejudiced by the destruction of evidence. They claim useful documents were discarded routinely or lost by the government. Blood stains on clothes taken from Mills could not be typed to prove their origin. Finger impressions on Pierce's arm and a wound on Mills' arm had healed.

There is no evidence about the deterioration rate of the blood stains, when Mills' and Pierce's wounds healed, or when the documents were destroyed or lost. They could have become unavailable for defendants' purposes even if the government had indicted defendants one month after the murder. Consequently, it cannot be said that the unavailability of this evidence

was related to a pre-indictment delay. See *United States v. Walker*, 601 F.2d 1051, 1057 (9th Cir. 1979).

We also note that this is not the appropriate time to determine whether the government had any obligation to preserve certain evidence. *Id.*

We find that there was insufficient evidence to establish actual prejudice. The district court abused its discretion in dismissing the indictment. It is unnecessary to consider the length of or the reason for the delay.² *West, supra*, 607 F.2d at 305.

E. Discovery

By petition for writ of mandamus, the government appeals the trial court's order requiring production of

² Our decision would be no different if we consider these factors. Mills and Pierce argue the delay of eight months was inexcusable because the government had interviewed most witnesses and evaluated the tangible evidence by mid-November 1979. However,

it is not enough to show that the prosecution could have proceeded more rapidly or that there were some months during the period of delay in which no additional investigation was taking place. The prosecution is not expected to account meticulously for each month that is taken in carrying out the appropriate prosecutorial functions.

United States v. Walker, 601 F.2d 1051, 1056 (9th Cir. 1979). There must be some culpable conduct by intentionally or recklessly delaying indictment to gain a tactical advantage. See *United States v. Swacker*, 628 F.2d 1250, 1254 n.5 (9th Cir. 1980); *Walker, supra*.

There was no evidence of intentional government delay. The investigation was ongoing until defendants were indicted.

We also note that eight months is not an inordinate delay. See, e.g., *Walker, supra*, at 1054 (thirteen-month delay); *United States v. Mays*, 549 F.2d 670 (9th Cir. 1977) (four-and-one-half year delay).

statements of inmates the government had interviewed but did not intend to call as witnesses.

The production of witness statements is governed by the Jencks Act. *Palermo v. United States*, 360 U.S. 343, 351, 79 S.Ct. 236, 3 L.Ed.2d 227 (1959); *United States v. Walk*, 533 F.2d 417, 419 (9th Cir. 1975). The Act provides that no statement of a government witness is discoverable until the witness has testified on direct examination. 18 U.S.C. § 3500(a); *United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1979), cert. denied, 445 U.S. 966, 100 S.Ct. 1656, 64 L.Ed.2d 242 (1980).

Federal Rule of Criminal Procedure 16(a)(2) excludes from pretrial discovery "statements made by government witnesses or prospective government witnesses, except as provided in 18 U.S.C. § 3500 [Jencks Act]." For the purposes of Rule 16, statements made by persons who were prospective witnesses when interviewed do not lose that character by a subsequent decision not to call them at trial.

Consequently, Mills' and Pierce's contention that the statements are discoverable as documents under Federal Rule of Criminal Procedures 16(a)(1)(C) fails. The trial court exceeded its authority by ordering the production of these statements over the government's objection. *United States v. Percevault*, 490 F.2d 126, 129 (2d Cir. 1974).

Our result is consistent with the policies underlying these discovery rules. Rule 16(a)(1)(A) authorizes broad pretrial discovery of defendant's statements because they are deemed vital to the defense. *Percevault*, *supra*. But this reasoning is not pertinent to statements made by prospective government witnesses. Protection of their statements is necessary to protect the witnesses from threats, bribery, and perjury. *Walk*, *supra*; *Percevault*, *supra*. The need

to protect those who cooperate with the government is especially compelling here where the witnesses are prison inmates who live in fear of retaliation for providing evidence against fellow inmates. Depriving them of that protection also jeopardizes the likelihood of future cooperation by prison inmates.

The writ is granted.

REVERSED and REMANDED for further proceedings.

NELSON, Circuit Judge, concurring specially:

I concur in the majority opinion. I must add that the facts of this case are unquestionably troubling. The conduct here creates a visceral reaction that this must be some kind of constitutional violation. The trial court's decision is thus understandable, and I regret that the law requires reversal.

Today's result must not be read, however, as suggesting that due process stops at the jailhouse door. The government cannot brazenly disregard prisoners' constitutional rights when preparing a criminal case against an inmate.

It is important to note that the instant appeal involves dismissal of the indictment by the lower court. In my view, defendants' strongest arguments are those alleging that their isolation wrongfully precluded them from engaging in the activities necessary to prepare an effective defense. Such a due process claim goes to the heart of a defendant's constitutionally protected right to defend himself at trial. The defendants' claims would thus be appropriately raised at trial. Our decision today, which reviews only the dismissal of the indictment, does not foreclose defendants from doing so.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CR 80-278-WPG

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROBERT EUGENE MILLS and
RICHARD RAYMOND PIERCE, DEFENDANTS

[Filed Aug. 14, 1980]

ORDER DISMISSING INDICTMENT

The defendants having moved this Court for an order dismissing the indictment against them; and the motion having come on for hearing on July 21, 1980; and the Court having considered fully the memorandum and declarations submitted in support of, and in opposition to, the motion as well as the argument of counsel, the Court rules as follows:

SUMMARY OF RULINGS

1. By virtue of the government's ten-month delay in bringing this matter to trial, defendants were denied their Sixth Amendment right to a speedy trial;
2. By virtue of the government's seven-month delay in bringing this matter to indictment, defendants were denied their Fifth Amendment right to due process; and

3. By virtue of the government's conduct in holding the defendants incommunicado for a period of eight months and in refusing to appoint attorneys for them or otherwise to permit them to interview witnesses and preserve evidence during this period, the defendants were denied their Fifth Amendment right to prepare a defense and their Sixth Amendment right to counsel.

FACTUAL BACKGROUND

The Court's ruling in these regards are based on the following:

1. On the evening of August 22, 1979, Thomas Hall, an inmate of FCI, Lumpoc, was murdered. Within hours of the murder, the defendants, who were also inmates, were detained, interrogated and subjected to physical examinations by the FBI and prison authorities. Throughout the interrogation and examinations, the defendants stated that they did not want to be questioned or examined further without being permitted to consult with an attorney. The government consistently denied the defendants' request for counsel, and it continued the interrogation and examination. At one point, the defendants were asked to sign waivers of counsel, which they refused to do.

2. At the conclusion of the interrogation and examination, the defendants' clothing and personal property were confiscated, and the defendants were sent to solitary confinement in "strip cells" located in the basement of the prison's Administrative Detention Unit ("ADU"). As prison records indicate, on the morning following the murder, the defendants were committed to semi-solitary confinement in the ADU

"pending investigation or trial for a criminal act." This characterization of defendants' ADU commitment is not disputed by the government. Although Bureau of Prisons' policy would have required the defendants' release back into the general prison population or their transfer to a more secure facility within the first few months after their ADU commitment, the defendants remained in segregation until they were transferred to the Los Angeles County Jail for their post-indictment arraignments on April 21, 1980.

3. During their first two weeks in solitary confinement in ADU, defendant Mills was reminded by prison employees that he and Pierce were under suspicion for the murder of Thomas Hall, although they were not questioned again about the murder until approximately two weeks after their commitment. At that time, defendants were summoned to a hearing before the Unit Disciplinary Committee ("UDC"), consisting of their counselor and their case managers. During the hearing, the defendants were informed that, based on confidential sources, the government had concluded that they were responsible for the murder of Thomas Hall. As prison records confirm, the defendants again denied involvement in the Hall murder, and renewed their request that counsel be appointed on their behalf. The government again denied their requests for counsel.

4. Shortly after the UDC hearing, on or about September 13, 1979, the defendants were called to a second hearing before the Institutional Disciplinary Committee ("IDC"). Senior officials from the prison administration conducted this hearing, during which the defendants reiterated their innocence and requested the appointment of counsel. The defendants

were told they had no right to an attorney. During his hearing, defendant Mills was encouraged by the hearing officer to "talk to him in private" about the Hall murder, and to disclose the names of inmates who might be favorable witnesses to defendants. Defendant Mills refused, and his request for an attorney or some other neutral (non-prison staff) party to contact such inmates was refused. At the conclusion of the IDC hearing, the defendants were told they were guilty of the Hall murder, and that they were to be sent to the Control Unit of FCI, Marion, Illinois, the federal prison system's highest security facility. Subsequently, defendant Mills was interviewed by a Federal Bureau of Prisons official for potential placement at Marion, and told that the government was preparing an indictment against him for the murder of Thomas Hall. That indictment was returned by the grand jury on March 27, 1980.

5. During the eight months the defendants were held in solitary confinement, they were not permitted to contact other inmates in the prison (except those also confined in ADU), to contact potential non-inmate witnesses, to discuss their case with anyone other than prison officials, or to be examined by their own doctors and experts. Nor were the defendants provided an attorney or other neutral person to assist them in contacting witnesses, preserving evidence or advising them generally with respect to the murder charges for which they were then being detained.

6. The defendants' commitment to ADU in this case resulted in a dramatic change from the conditions under which they previously had lived in prison. Relative to inmates in the general prison population, defendants' freedom of movement was severely curtailed. Their contact with fellow inmates was vir-

tually eliminated, as were their opportunities for recreation, education and employment. In addition, as a result of their commitment to ADU, the defendants understandably concluded that some of the inmates in the general population assumed that the defendants had been placed in ADU for their own safety for having informed on other inmates; and that other inmates concluded that because prison authorities had committed the defendants to ADU, the defendants were in fact responsible for the Hall murder. Consequently, the defendants felt threatened by two groups of inmates, those who would avenge Hall's death and those who would seek to punish the defendants for their apparent violation of the inmate prohibition against informing.

7. Defendants' eight-month isolation in ADU, coupled with the government's refusal to provide them with counsel during the period of their ADU commitment, resulted in acute emotional and mental strains being placed on the defendants. Moreover, the defendants were deprived of even the meager freedom of movement and association and recreational, educational and employment opportunities enjoyed by inmates in the general prison population. Further, isolated in ADU without the assistance of counsel or some other representative, defendants were made to suffer the frustration of being wholly unable to begin preparing a defense to the murder charges they had been informed would be forthcoming.

8. The government has failed to justify its delay in seeking indictments or in bringing the defendants to trial, or to explain why for eight months the defendants remained in isolation without the assistance of counsel while the government acted to tie together its own case against them. By the evening of August

22, 1979, when the defendants were placed in segregation, the finger of suspicion had already pointed toward them. As government counsel conceded during argument, had the defendants been at-large on the evening of the murder, under the circumstances of this case they would have been promptly arrested, taken before a magistrate and provided with counsel.

9. It is manifest that the government could have moved this case to indictment and trial with far greater dispatch than it did. By September 20, 1979, the government had interviewed all of the prison employees on whose testimony it could have relied at trial. With one exception, all of the inmate witnesses' testimony on which the government intended to rely at trial had been obtained through witness interviews which were completed by October 1979. By the end of October 1979, the government had concluded over 131 inmate witness interviews, but it conducted only 16 inmate witness interviews from the beginning of November through the date on which an indictment was sought, March 27, 1980. With respect to tangible evidence, of the 30 items of physical evidence pertaining to this case, the FBI had analyzed 21 of these items by November 15, 1979. Additional analyses were postponed pending receipt of samples of the defendants' hair and blood. Yet, the government declined to request a grand jury subpoena for these samples when the grand jury was first convened in October 1979. Instead, it deferred until after an indictment was returned.

10. Defendants' eight-month detention in ADU, their total segregation from the general prison population and the government's refusal to appoint counsel or some other neutral investigator on their behalf combined to prejudice irreparably the defend-

ants' ability to prepare for trial and to contest the charges against them. Specifically, defendants have been prejudiced by the dimming of memories of witnesses who could have substantiated their alibi; by the irrevocable loss of inmate witnesses known to the defendants only by prison "nicknames" now long-since transferred to other institutions or released from custody altogether; and by the deterioration of physical evidence essential to corroborate the defendants' testimony and to rebut the evidence against them. In short, because of their belated appointment, and because of the transitory nature of the prison population, defense counsel simply did not have the opportunity to make the kind of investigation that the government made. The handicaps under which the defense must now operate cannot be remedied at this late date.

LEGAL CONCLUSIONS

Based on the foregoing, the Court holds as follows:

1. For purposes of the Sixth Amendment guarantee of a speedy trial, defendants stood "accused" of the murder of Thomas Hall when on the evening of August 22, 1979, they were committed to ADU. The circumstances of this case differ markedly from those in *United States v. Clardy*, 540 F.2d 439 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976), which held that on the facts there *sub judice*, segregation of a prisoner for purposes of imposing prison discipline did not constitute an "accusation." Here, defendants' commitment to ADU was neither a form of prison discipline nor an attempt to ensure prison security. Rather, defendants were detained in ADU "pending investigation or trial for a criminal act." The commitment therefore bears all of the indicia of a criminal arrest

and must be viewed as part and parcel of a sequence of prosecutive acts integrally related to the application of criminal sanctions. Further, on the facts of this case, the consequences of the defendants' commitment to ADU—depriving them of all contact with fellow inmates, stigmatizing them in the eyes of the prison population, subjecting them to the possibility of inmate reprisals, creating in them and their families and friends justifiable anxiety, and precluding them from preparing a defense—are indistinguishable from the constitutionally significant consequences of "arrest" identified by the Supreme Court in *United States v. Marion*, 404 U.S. 307, 331 (1971).

2. Because the defendants stood accused of the murder of Thomas Hall for some ten months prior to the date initially set for trial, and because the government has failed to justify its delay in bringing the defendants to trial, the Court finds that defendants were denied their Sixth Amendment right to a speedy trial.

3. Viewing this case as one solely of pre-indictment delay, the Court is persuaded that defendants were denied due process by the government's seven-month delay in seeking an indictment against them. Although by October 1979 the government had substantially completed its investigation and had uncovered virtually all the evidence it intended to use against the defendants, an indictment was not sought for an additional five months. In view of the defendants' segregated confinement and lack of representation while the government conducted its pre-indictment investigation, the government had an obligation to seek an indictment with all deliberate speed. As the defendants have demonstrated with the requisite specificity, the government's failure to discharge this

obligation severely and irreparably prejudiced the defendants' ability to prepare for trial and to contest the charges on the merits.

4. As an independent basis for this order, the Court determines that defendants were deprived of their Sixth Amendment right to counsel. Viewing their ADU detention as an arrest for Sixth Amendment purposes, defendants were entitled to the prompt commencement of adversarial proceedings which would have triggered their right to counsel. However, through the process of "administrative" detention, the government delayed for eight months the commencement of adversarial proceedings and effectively frustrated the defendants' right to counsel. As a result, defendants were denied any effective opportunity to have an investigation conducted on their behalf while events were still recent and recollections intact. When attorneys were appointed eight months later, they were precluded by the passage of time from conducting an investigation anywhere near as thorough as that made by the government.

5. Moreover, even if the Sixth Amendment right to counsel is not viewed as attaching at or near the time of defendants' commitment to ADU, the Court is persuaded that defendants nonetheless enjoyed a right under the due process clause of the Fifth Amendment to prepare a defense. Under the circumstances of this case, that right, too, was denied them. For a period of eight months, defendants remained substantially incommunicado, isolated from potential witnesses, precluded from preserving favorable testimony and evidence, and unable to prepare a rebuttal to the evidence against them. To the extent that the government was not obligated to appoint counsel on their behalf prior to their arraignment, and chose

not to honor the defendants' requests for counsel at an earlier date, the government was obligated to relax the conditions of the defendants' custody so as to provide them with a meaningful opportunity to prepare a defense to the charges that were forthcoming. Because the passage of time has resulted in the irrevocable loss of exculpatory testimony and evidence, the government's failure to take steps to preserve the defendants' right to prepare a defense cannot be remedied other than by dismissing the indictment.

ACCORDINGLY, IT IS HEREBY ORDERED that the indictment is dismissed with prejudice.

DATED: August 14, 1980

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

Presented by:

/s/ Charles P. Diamond
CHARLES P. DIAMOND
Attorney for Defendant Robert E. Mills

No. 83-128

Supreme Court, U.S.
FILED

23 1983

ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GOUVEIA, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT*

JOINT APPENDIX

(List of Counsel on Inside Cover)

**PETITION FOR WRIT OF CERTIORARI FILED
JULY 25, 1983
CERTIORARI GRANTED OCTOBER 17, 1983**

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES v. ADOLPHO REYNOSO,
ROBERT RAMIREZ, WILLIAM GOUVEIA, AND
PHILIP SEGURA,

CR-80-535-01-MML, CR-80-535-02-MML,
CR-80-535-03-MML, CR-80-535-05-MML

DATE	PROCEEDINGS
6.17.80	Indictment filed
7.14.80	Arraignment; attorneys appointed for defendants
7.21.80	Arraignment of defendants Reynoso, Ramirez, Segura; new attorney appointed for defendant Segura; trial date set for 9.16.80
7.22.80	Arraignment of defendant Gouveia
8.18.80	Defendants' motion for discovery granted in part and denied in part
9.4.80	Order granting application of defendant Ramirez for appointment of investigator; order granting application of defendant Gouveia for appointment of fingerprint analyst
9.8.80	Order denying defendants' motion to dismiss indictment; order denying motion for continuance
9.9.80	Order re making certain Brady material available to defense counsel
9.15.80	Order granting application of defendant Gouveia for appointment of investigator
9.16.80	Trial begins
9.24.80	Defendants' motion for judgment of acquittal denied
10.2.80	Jury begins deliberations
10.6.80	Jury acquits co-defendant Flores; jury acquits defendant Reynoso on weapons charge
10.9.80	Mistrial declared; jury unable to reach verdict
11.3.80	Trial date set for 2.17.81
1.5.81 through	
1.29.81	Various orders requiring appearance and transportation of inmate witnesses
2.2.81	Government's motion for continuance denied

DATE	PROCEEDINGS
2.17.81	Retrial begins
2.24.81	Order granting application of defendant Gouveia for appointment of investigator
3.11.81	Jury begins deliberations
3.13.81	Jury returns verdicts of guilty as to all defendants
4.23.81	Motion for new trial denied; defendants sentenced; notices of appeal filed by defendants Ramirez, Gouveia, and Segura
4.27.81	Notice of appeal filed by defendant Reynoso

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Gouveia, William	No. 81-1271
Ramirez Robert	No. 81-1272
Segura, Philip	No. 81-1273
Reynoso, Adolpho	No. 81-1274

Date	Proceedings
9.15.82	Case ordered heard by an en banc panel
11.12.82	Case consolidated with <i>Mills</i> and <i>Pierce</i>
12.15.82	Oral argument
4.26.83	En banc court of appeals reverses judgments of district court and remands with instructions to dismiss the indictments
5.16.83	Court of appeals issues stay of mandate
10.17.83	Order of Supreme Court granting petition for a writ of certiorari

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

March 1980 Grand Jury

No. CR 80-535

Filed: Jun. 17, 1980

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ADOLPHO REYNOSO, AKA "CHAMP," ROBERT RAMIREZ, AKA
"BLACK BOBBY," WILLIAM GOUVEIA, AKA "WILLIE BOBO,"
PEDRO FLORES, AKA "BLACK PETE," PHILIP SEGURA, AKA
"BLACK," STEVEN KINARD, DEFENDANTS

INDICTMENT

[18 U.S.C. § 1117: Conspiracy, §1111: Murder; §1792:
Conveyance of Weapon; §2(a): Aiding and Abetting; §3:
Accessory after the Fact]

The Grand Jury charges:

COUNT ONE

[18 U.S.C. §1117]

On or about November 1, 1978 and continuing until November 11, 1978, within the Central District of California, defendant ADOLPHO REYNOSO, also known as "Champ," defendant ROBERT RAMIREZ, also known as "Black Bobby," defendant WILLIAM GOUVEIA, also known as "Willie Bobo," defendant PEDRO FLORES, also known as "Black Pete," defendant PHILIP SEGURA, also known as "Black," and defendant STEVEN KINARD (collectively referred to as "the conspirators"), knowingly and willfully conspired with each other to commit offenses in violation of the laws of the United States as follows:

1. It was part of the conspiracy that the conspirators willfully, deliberately, maliciously and with premeditation and malice aforethought would murder a human being, Thomas Trejo, at the Federal Correctional Institution, Lompoc, California, within the special maritime and terri-

torial jurisdiction of the United States, in violation of Title 18, United States Code, Section 1111.

2. It was a further part of the conspiracy that the conspirators would convey from place to place within the Federal Correctional Institution knives designed to kill an inmate, Thomas Trejo, in violation of Title 18, United States Code, Section 1792.

MEANS OF THE CONSPIRACY

The objects of the conspiracy would be and were accomplished as follows:

1. ADOLPHO REYNOSO would and did direct the conspirators to begin planning the murder of Thomas Trejo.

2. ADOLPHO REYNOSO would and did direct ROBERT RAMIREZ to obtain knives to murder Thomas Trejo.

3. ROBERT RAMIREZ would and did direct PEDRO FLORES to obtain the knives from the Federal Correctional Institution metal workshop.

4. PEDRO FLORES would and did bring into the Federal Correctional Institution at Lompoc, California knives intended to murder Thomas Trejo.

5. ADOLPHO REYNOSO, ROBERT RAMIREZ and PHILIP SEGURA would and did stab Thomas Trejo.

6. WILLIAM GOUVEIA and STEVEN KINARD would and did dispose of the knives used to murder Thomas Trejo.

To accomplish the objects of the conspiracy the conspirators committed numerous overt acts within the Central District of California including the following:

1. On or about November 1, 1978 ADOLPHO REYNOSO told ROBERT RAMIREZ, and PEDRO FLORES that Thomas Trejo "had to go."

2. On or about November 1, 1978 ADOLPHO REYNOSO told ROBERT RAMIREZ to obtain knives.

3. On or about November 1, 1978 ADOLPHO REYNOSO told ROBERT FLORES to pick up knives from ROBERT RAMIREZ.

4. On or about November 2, 1978 PEDRO FLORES buried knives in the prison yard at the Federal Correctional Institution, Lompoc, California.

5. On or about November 4, 1978 PEDRO FLORES brought knives into the "J" Unit Dormitory at the Federal Correctional Institution, Lompoc, California.

6. On or about November 11, 1978 PEDRO FLORES handed ADOLPHO REYNOSO a knife.

7. On or about November 11, 1978 ADOLPHO REYNOSO, PHILIP SEGURA and ROBERT RAMIREZ stabbed Thomas Trejo to death.

8. On or about November 11, 1978 STEVEN KINARD told Willard Taylor to "get rid" of the knives.

9. On or about November 11, 1978 WILLIAM GOUVEIA asked Willard Taylor to dispose of the knives.

10. On or about November 11, 1978 STEVEN KINARD handed knives to Willard Taylor.

COUNT TWO

[18 U.S.C. §§ 1111, 2(a), 3]

On or about November 11, 1978, at the Federal Correctional Institution at Lompoc, California, within the Central District of California, within the special maritime and territorial jurisdiction of the United States, defendants ADOLPHO REYNOSO, ROBERT RAMIREZ, and PHILIP SEGURA aided and abetted by WILLIAM GOUVEIA, and PEDRO FLORES, willfully, deliberately, maliciously and with premeditation and malice aforethought murdered Thomas Trejo.

STEVEN KINARD, knowing that ADOLPHO REYNOSO, ROBERT RAMIREZ, and PHILIP SEGURA, aided and abetted by WILLIAM GOUVEIA and PEDRO FLORES committed an offense against the United States assisted these individuals in order to hinder or prevent their apprehension.

COUNT THREE

[18 U.S.C. § 1792]

On or about November 4, 1978, PEDRO FLORES, within the Federal Correctional Institution at Lompoc, California in the Central District of California, conveyed from place to place in the institution, a knife designed to injure an inmate of the institution.

COUNT FOUR**[18 U.S.C. § 1792]**

On or about November 10, 1978, PEDRO FLORES, within the Federal Correctional Institution at Lompoc, California, in the Central District of California, conveyed from place to place in the institution, a knife designed to injure an inmate of the institution.

COUNT FIVE**[18 U.S.C. § 1792]**

On or about November 10, 1978, ADOLPHO REYNOSO, within the Federal Correctional Institution at Lompoc, California, in the Central District of California, conveyed from place to place in the institution, a knife designed to injure an inmate of the institution.

COUNT SIX**[18 U.S.C. § 1792]**

On or about November 11, 1978, STEVEN KINARD, within the Federal Correctional Institution at Lompoc, California, in the Central District of California, conveyed from place to place in the institution, a knife designed to injure an inmate of the institution.

A TRUE BILL

/s/

Foreperson

/s/

ANDREA SHERIDAN ORDIN
United States Attorney

DECLARATION OF PEDRO FLORES

STATE OF CALIFORNIA)
) ss.
 COUNTY OF LOS ANGELES)

I, PEDRO FLORES, declare as follows:

1. I am the defendant in the above-captioned case.

2. On November 11, 1978, I was confined in the administrative detention unit at Lompoc Federal Correctional Institution. I was released into the general prison population on or about November 22, 1978. On December 4, 1978, I was returned to solitary confinement in the ADU. On or about March 15, 1979, I was released from solitary confinement. During April of 1979, I was transferred to the Federal Correctional Institution in Atlanta, Georgia.

3. On December 15, 1978, and December 21, 1978, I appeared before prison administrative disciplinary committees. I asked for counsel and was denied this right. The charge at the hearings was involvement in the murder of Thomas Trejo. I asked to have Vernel Phillips, a prison guard, as a witness. I was told he no longer worked for the institution. I was found guilty of the murder.

4. At every occasion where it could have been relevant, I asked for the right to have an attorney assist me in defending against the charge of complicity in the murder of Thomas Trejo. I was consistently denied the right by prison officials.

5. During the above-mentioned solitary confinement, I was not allowed to communicate with other prisoners. I was denied access to the regular prison law library. I am informed and believe, based upon my knowledge of Lompoc, that my reputation was damaged and my physical safety was endangered by my solitary confinement and by the finding of the disciplinary committees that I was involved in the Trejo killing. When a prisoner is confined to solitary for a murder, the inmates who were friends of the victim often assume the person confined is guilty and plan revenge. Other inmates, acquainted with the pressures placed on an inmate in solitary, assume that he has become an informant. These and other factors involved in solitary

confinement cause severe threats to the safety and reputation of a person so confined.

6. The period of solitary confinement just mentioned and my transfer to Atlanta prevented me from doing anything to aid in my own defense against the charge of murder. I am apparently accused of transporting knives through the prison over a period of several days. At the time the incident occurred, with the assistance of a lawyer, it would have been possible to find witnesses who remembered where I was at all times of the days in question. With a passage of close to two years by the time of my scheduled trial, finding enough witnesses in or out of custody will be a difficult task. This is even more true due to the fact that I knew many inmates only by nicknames. Now that many of them have been released or transferred to other institutions, prison records would be of no help in locating them, as the prisoners are not listed by nicknames.

7. I am unaware of any other charge besides the murder of Thomas Trejo that could have caused my solitary confinement and my transfer to Atlanta.

8. I have provided my counsel, Michael A. Brush, with some names of potential witnesses, but many of the details of the days in question between November 4, 1978, and November 11, 1978, have faded from my memory, including the names and nicknames of inmate witnesses. I was unable to make adequate notes of the details of my whereabouts during the week between November 4 and November 11, 1978, due to my solitary confinement and my lack of knowledge of the specific details of the charges against me.

9. I am also informed and believe that any relevant physical evidence I might have possessed is now gone in the process of the solitary confinement and the Atlanta transfer and the transfer back to California.

10. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of August, 1980, at Los Angeles, California.

/s/

PEDRO FLORES

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

UNITED STATES GOVERNMENT

Memorandum

TO : Detention Unit Supervisor

DATE: 11 Nov 78

FROM : *F. Hunt*
Correctional Supervisor

SUBJECT: Administrative Detention

FLORES, Pedro

Reg. No. 35824-136(J) Unit: J

is being placed in administrative detention for the following reason(s):

- ☐ Pending a hearing for a violation of institution rules or regulations.
- ☐ Pending an investigation of a possible violation of an institution rule, but where charges have yet to be lodged.
- ☒ Pending investigation or trial for crimes committed in the institution.
- ☐ An inmate requests admission to the Administrative Detention area for his own protection.
- ☐ An inmate in holdover status awaiting transfer.
- ☐ Pending classification.
- ☒ Continued presence of this inmate in general population poses a serious threat:
- | | |
|--|---|
| <input type="checkbox"/> to Life | <input type="checkbox"/> himself |
| <input type="checkbox"/> property | <input type="checkbox"/> other inmates |
| <input type="checkbox"/> staff members | <input checked="" type="checkbox"/> the security of the institution |

COMMENTS:

INVESTIGATION

Distribution: Team ☒
Inmate File ☒
Inmate Yes ☒ No ☐



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

EXHIBIT A

FEDERAL BUREAU OF PRISONS

REQUEST FOR ADMINISTRATIVE REMEDY

INSTRUCTIONS:

TYPE OR USE BALL POINT
PEN. IF MORE SPACE IS
NEEDED, USE ATTACHMENT
SHEET IN QUADRUPPLICATE.

*To: ☒ Warden of Institution
☐ Regional Director, Bureau of Prisons

From: FLORES, PEDRO 35824-136 Lompoc
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. INSTITUTION

Part A—INMATE REQUEST

I AM PRESENTLY BEING HELD IN ADMINISTRATIVE DETENTION FOR AN INCIDENT THAT OCCURED NOV. 11, 1978. AND ON THAT DATE I DID NOT LEAVE MY HOUSING UNIT, "J," SAVE FOR EARLY MEAL, WHICH WAS APPROXIMATELY 3.30 AM. THE HOUSING OFFICER THAT DAY, MR. PHILLIPS, CAN SURELY ATTEST TO THAT FACT.

NOV. 14, 1978
DATE

Pedro Flores
SIGNATURE OF REQUESTOR

Part B—RESPONSE

You were placed in administrative detention in accordance with Lompoc policy 7400.4-239 dtd. 9-5-75 -Inmate Discipline. An inmate may be placed in ADU pending investigation or trial for a criminal act. Due to the seriousness of the offense for which you were under investigation, it was not possible to complete this investigation under the normal 24 hr. period. Your record file shows you received a copy of memo dtd. 11-11-78 re: Adm. Detention, prepared by Fred Munz, CS. That memo advised you were placed in detention unit pending investigation. At the conclusion of the investigation, you were released to the general population, therefore, your request for relief is denied.

12-5-78
DATE

Idame Actula K
DEPARTMENT HEAD OR REPRESENTATIVE

Jamesley
WARDEN, ASSOCIATE, OR REGIONAL DIRECTOR

ORIGINAL: TO BE RETURNED TO THE OFFENDER AFTER COMPLETION.

Part C—RECEIPT

Return to: FLORES, PEDRO 35824-136(J) Lompoc
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. INSTITUTION

I acknowledge receipt this date of a complaint from the above inmate in regard to the following subject:

Request to VR, dated 11/11/78 to expunge

11/20/78
DATE

Edith K. Daughton
RECIPIENT'S SIGNATURE (STAFF MEMBER)

*(CHECK ONE) BLANK ONLY.) (SEE NECESSARY REQUIREMENT FOR DIRECT SUBMISSION TO THE REGIONAL DIRECTOR ON REVERSE SIDE.)

UNITED STATES GOVERNMENT

Memorandum

TO : Detention Unit Supervisor

FROM : *J. Haupt*
Correctional Supervisor

DATE: Dec. 4, 1978

SUBJECT: Administrative Detention

Flores, Pedro

Reg. No.

35824-136

Unit: J-unit

is being placed in administrative detention for the following reason(s):

- ☐ Pending a hearing for a violation of institution rules or regulations.
- ☒ Pending an investigation of a possible violation of an institution rule, but where charges have yet to be lodged.
- ☒ Pending investigation or trial for crimes committed in the institution.
- ☐ An inmate requests admission to the Administrative Detention area for his own protection.
- ☐ An inmate in holdover status awaiting transfer.
- ☐ Pending classification.
- ☒ Continued presence of this inmate in general population poses a serious threat:
- | | |
|--|---|
| <input type="checkbox"/> to Life | <input type="checkbox"/> himself |
| <input type="checkbox"/> property | <input checked="" type="checkbox"/> other inmates |
| <input type="checkbox"/> staff members | <input checked="" type="checkbox"/> the security of the institution |

COMMENTS:

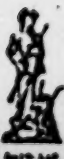
Investigation.

Distribution: Team

Inmate File ☒Inmate ☒ Yes ☒

EXHIBIT C

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan



DECLARATION OF MICHAEL A. BRUSH

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, MICHAEL A. BRUSH, declare as follows:

1. I am counsel of record for Defendant Pedro Flores in the above-captioned case.

2. My conduct of the defense of Pedro Flores has been hampered by the passage of one year and seven months prior to the filing of the indictment. Some of the factors involved in this interference with my defense of my client are as follows:

3. In conversations with employees of the Federal Correctional Institution at Lompoc, I have learned the following concerning potential witnesses: Steve Broughton was transferred to Terminal Island on June 23, 1980. Tony Palacios has been transferred to the Marion federal prison in Illinois. Willard Taylor has been released from Lompoc and the records show no address or location where he can be reached. Inmates are not listed by nickname, so that all witnesses I have learned of who are identified only by nickname cannot be located through prison records. At the time of the charged offense, my client was in J unit at Lompoc. I was informed by Mary Sue Guthridge, secretary of J unit that no unit census was taken during November, 1978, so that no reconstruction of the J unit inmate population could be accomplished. She also indicated that the average population in J unit is 120. Central records at Lompoc also do not maintain for November, 1978, any record of the inmates indexed by unit. I learned that M unit in which the killing of Thoms Trejo took place was at the time an admission and orientation unit with a high turnover. K unit of relevance to the charges also had about 120 inmates at the time of the charged incident. C unit, also of relevance, may at the time of the offense have been combined with another unit. Among the persons I spoke with in records was Karin Seaberg, a statistical coordinator.

4. At this point, I am totally in the dark as to the times and places my client is alleged to have transported knives

for the murder. The indictment is inconsistent in its allegations. As far as I can tell, it is only the transportation of knives that causes my client to be included in any count of the indictment. Since the government has refused to provide any information that will pin down the specific hours of the day and places involved in the charges against my client, my defense in the light of the great passage of time is greatly hampered.

5. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of August, 1980, at Santa Monica, California.

/s/

MICHAEL A. BRUSH

DECLARATION OF ADOLPHO REYNOSO

I, ADOLPHO REYNOSO, declare and state as follows:

1. Starting in October 13, 1978, I was an inmate at the Federal Correctional Institution at Lompoc, California confined within the general population at the main facility.

2. On November 11, 1978, I was confined in the Administrative Detention Unit (ADU) at Lompoc Federal Correctional Institution. I was released into the general population on November 22, 1978. On December 4, 1978, I was returned to solitary confinement in the Administrative Detention Unit. I have been held in solitary confinement to the present day.

3. On November 21, 1978, I was interviewed by agents of the FBI. I was never read my constitutional rights by the agents of the FBI. I did, however, request that I be provided with an attorney. I was told by the FBI agents that I didn't need one since I was going to be released the next day. On November 22, 1978, I was released.

4. I was led to believe by my release on November 22, 1978, that I was no longer a suspect in the killing of Thomas Trejo. I therefore, did not concern myself with the particulars of the case. However, on December 4, 1978 without warning I was again incarcerated in solitary confinement at the ADU. I was told that I was being held pending the criminal investigation of the case into the killing of Thomas Trejo.

5. On December 15, 1978 and on December 21, 1978, I appeared before the Prison Administrative Disciplinary Committee. I asked for an attorney and was denied this right. I was advised on December 15, 1978 that I was charged with murder of Thomas Trejo. I asked for an attorney at that time and that right was denied. I asked to have Vernel Phillips, a prison guard, as a witness. I was told that Vernel Phillips was no longer employed with the Federal Correctional Institution at Lompoc. I was not told, however, whether Vernel Phillips was fired, nor given any other reason for his leaving the institution. No witnesses were produced at the hearing. I was not given information as to what if any evidence existed against me. I was found

guilty on December 21, 1978 of being involved in the murder of Thomas Trejo. I gave notice on or about January 1, 1979 of my intent to appeal the decision to the Warden. In that notice, I again asserted that I had a right to an attorney. At every occasion where it could have been conveyed to the prison authorities, I asked for the right to have an attorney to assist me in defending me against the charge of having murdered Thomas Trejo. I was consistently denied the right to an attorney by both prison officials and members of the FBI.

6. There is a significant difference between being in the general prison population and being held in solitary confinement in ADU. A person confined in the general population at Lompoc begins his day at 6:00 AM. When the cell doors are opened for breakfast, an inmate can leave their cells and walk about in the common areas, and go to the dining hall. At approximately 8:00 AM, there is work call, and inmates in the general population go to their assigned jobs, which may include, for example, carpentry, work in the cable shop, or work on the grounds. At noontime, the inmates are called back into the dining hall, and after lunch, returned to their work areas until approximately 4:00 PM. At 4:00 PM, it is required that everybody go back to their cell for the afternoon count. From approximately 4:00 PM until 4:30 PM, each inmate is locked in his individual cell. This 30 minute period is the only time during the entire when the inmates are confined to their individual cells. At approximately 4:30 PM, the cell doors are opened and the call of units to the dining hall begins. After the count, inmates may choose to go to see a movie, or go to a recreation yard for exercise, or go to the gym to exercise or work out. At approximately 8:30 PM, everyone must return their respective units, but inmates are not locked into their individual cells at this time, and may move freely about the unit. At approximately 10:00 PM, inmates are given the option of going to their cells to go to sleep or go into a TV room to watch TV. There are also available to inmates in the general population a variety of educational programs. Also, when you are in the general population, you are permitted to have toiletries, books and other personal items in your cell.

The doors to the cells for prisoners in the general population are solid, with a small window, which affords privacy for the inmate when he is in his cell. Inmates in the general population are also provided excess to telephone room, where they can make telephone calls in private. There is no limited number of calls that can be placed through the system. Also, for the inmates in the general population, visiting hours are from 12:00 PM to 3:30 PM on weekdays and, 8:00 AM to 3:30 PM on weekends. There are no limitations on the amount of time that inmates in the general population may spend with their visitors, and there is an outside area which has been provided for the use prisoners and their families.

7. Solitary confinement in the ADU or the "hole" is entirely different. Inmates in the hole are held in their cell for the entire day, with the exception of a 30 minute break. The cells are approximately 4'x6' in dimension. This 30 minute break is the only period of time during the day when you are permitted to leave your cell. During this time, you may shower or exercise. However, either one or both of these activities must be conducted within the 30 minute period. You are permitted absolutely no contact with prisoners, either during the time you are confined to your cell, or during the 30 minute break. Relief periods are staggered so that only one inmate in ADU at a time is out of the cell. Once every seven days, the guards take you out of your cell into a stoned enclosure outside to exercise for approximately one hour. There is no training equipment in this area, no grass, and no view of access to any other prisoners. The area is entirely concrete, with a concrete floor, surrounded on all sides by concrete walls. This area can get very hot in the summer. Inmates in the hole eat in their cells, and each cell has a toilet. Also, the doors to the cells are comprised of bars, so that there is absolutely no privacy from the guards. Whereas prisoners in the general population are permitted to purchase carpets to put on their floors if they desire, no such privilege is allowed in the hole, and the cement cell floors must remain uncovered. Also, whereas prisoners in the general population are permitted to purchase clothing, toiletries, coffee, and other good at the com-

missary, prisoners in ADU have a restrictive list of goods which they may purchase from the commissary. For example, you must wear kaki clothes issued to you by prison authorities when you are in ADU, and you cannot buy any clothes of your own, or wear any clothes which you previously purchased. Also, you are not permitted to purchase any objects that come in metal or glass containers. Inmates held at the hole are permitted one telephone call per month, and this call must be made in the presence of a counselor, guard, or case manager. Visitation hours are the same as those with the general population, but inmates in the hole are limited to two hours with their visitors. Furthermore, at no time may more than five inmates on ADU be in the visiting area. If more than five ADU inmates are in the visiting area, the first ADU prisoner to have arrived is taken back to his cell, and his visitation period is cut off. ADU prisoners and their families are denied access to the outside portion of the visiting area. In ADU, lights are out between 9:30 PM and 10:00 PM. Finally, inmates at ADU are not permitted to participate in any of the prison's educational, recreational, or work programs, nor are they permitted any television or movie rights of any kind.

8. During my above mentioned solitary confinement, I was not allowed to communicate with any of the prisoners. It is general knowledge within the prison system that when a person is confined to solitary confinement for the murder of another inmate or a person is found to be guilty by the disciplinary hearing, said person is presumed guilty of the crime by other inmates and often other inmates plan revenge. Further, other inmates, acquainted with the pressures placed on the inmate in solitary confinement assume that he has become an informant. These and other factors involve in solitary confinement create threats to the safety and reputation of a person so confined. I was aware of these factors, and was apprehensive as a result thereof.

9. As a result of my solitary confinement, I have been prevented from doing anything to aid in my defense against the charge of murder. I was denied the ability to secure witnesses which might have been useful to me in defense of these charges. At the time that the incident occurred, with-

in a reasonable period of time thereafter, it would have been possible to find witnesses who remembered where I was at all times on the days in question. These are the days of November 1, 1978 through November 11, 1978. It has been almost two years since the events of November 11, 1978. Locating witnesses in or out of custody will be an impossible task in view of the fact that I do not know the true name of many inmates and know them only by nicknames or appearance. It must be kept in mind that I was only at the institution approximately a month before I was placed in solitary confinement. Many of these potential witnesses have been released or transferred to other institutions, and since I do not know the true names of these individuals, prison records will be of little help in locating them. The documents I have examined do not list prisoners by nicknames, or even by cell numbers. As can be seen by my statement on November 21, 1978 to the FBI, I did not know even then the names of three persons who I believe will substantiate the fact that I was not involved in the murder of Thomas Trejo. If I had been in the general population after I had been informed that the charges were still pending against me, it would have been possible to have secured the true identity of these three individuals. Further, it would have been possible to have secure the identities of other individuals who could also attest as to my whereabouts on November 11, 1978. Whether or not the FBI made any efforts to secure the identity of these three individuals is not known to me.

10. What makes it even more difficult for me to assist my attorney in preparing a defense is the fact that the locator and unit rosters provided by the government to us pursuant to this court's discovery order do not list the first name of the inmates, do not give the cell number to which the inmates were assigned in respective unit, do not list nicknames, nor does it appear that the unit rosters provided are even for the dates in question, that is, the dates of November 11, 1978. For example, the duty roster for "D" unit is dated September 28, 1978. The duty roster for "F" unit is dated September 20, 1978, the roster for "H" unit is dated September 22, 1978, and the unit roster for "J" unit,

the unit I was assigned to, is dated October 3, 1978. I was not even in "J" unit until October 20, 1978. The unit roster for "K" unit is dated October 3, 1978. The duty roster for "L" unit is dated September 27, 1978. These unit rosters are useless to me in attempting to locate individuals who could verify my whereabouts on November 11, 1978. This is important because there were inmates in "J" unit who could corroborate the fact that I was watching the Nebraska/Oklahoma football game on the day of November 11, 1978. Some of these inmates were in the adjacent cells or were in cells across from me. While I could describe some of these individuals, I do not know their names and therefore has been virtually impossible for me to determine what their true identities might be. This means that I will in all likelihood be unable to produce witnesses that could prove my innocence of the charges pending against me.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: This 27 day of August, 1980.

/s/

ADOLPHO REYNOSO

DECLARATION OF MANUEL U. A. ARAUJO

I, Manuel U. A. Araujo, hereby declare and state as follows:

1. I am a Deputy Federal Public Defender appointed to represent the defendant, ADOLPHO REYNOSO, in case number CR 80-575-MML.

2. I have met with MR. REYNOSO following my appointment as counsel by the court, and have attempted with him to reconstruct the list of names of his defense witnesses, both alibi and otherwise. I have met with Mr. Reynoso at least three times for that purpose and have had an investigator from our office speak with the inmate locator in Washington, D.C., on two occasions. Despite these efforts, difficulties have remained.

(a) To this date, several potential witnesses are known to MR. REYNOSO only by nickname. Since MR. REYNOSO has been physically removed from these potential witnesses for almost two years, he cannot now find them with the limited information that we have.

(b) Several potential witnesses of the defendant cannot be found on the Lompoc inmate roster supplied by the prosecution, since the inmate rosters list the inmates by last name only and do not give the cell to which the inmates were assigned within the unit. Further, many of the inmate rosters provided to us by the government are for dates other than November 11, 1978.

(c) One of the alibi witnesses, Gary Lowe, died at Lompoc of natural causes in January, 1980. Another, Michael Thompson, died at Springfield Federal Penitentiary in June, 1979, also of natural causes.

(d) One of the witnesses desired to be subpoenaed by MR. REYNOSO is currently at the federal prison at Marion, Illinois. Writs will be processed for this person to be brought here for interview and possible testimony.

3. On August 18, 1980, at hearings on discovery motions, the Court ordered the government to provide me with records of both defendant REYNOSO's administrative hear-

ings at Lompoc and his detention in the isolation unit relating to the charges in this case. At this time, those records have not been made available to me.

4. The above information is supplied in support of defendant REYNOSO's motion to dismiss the indictment.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 27th day of August, 1980, at Los Angeles, California.

/s/

MANUEL U. A. ARAUJO
Deputy Federal Public Defender

FEDERAL BUREAU OF INVESTIGATION

Date of transcription: 12/4/78

ADOLPH C. REYNOSO, Inmate Number 35824-136, was interviewed in the Apprehension Room at the Federal Correctional Institution (FCI), Lompoc, California, where he is currently incarcerated. This interview was conducted in the presence of Investigative Lieutenant JAMES J. COOKSEY.

At the outset of the interview, REYNOSO was advised of the identity of the interviewing Agents and that the purpose of the interview was regarding the fatal stabbing of THOMAS ALBERT TREJO on November 11, 1978. REYNOSO initially provided the following information:

REYNOSO advised that he was born on August 21, 1943, in Denver, Colorado, and is currently doing a sentence for bank robbery. Prior to being locked in "I" Unit, he resided in cell E-17 in "J" Unit.

REYNOSO advised that on the morning of November 11, 1978 he awoke at approximately 5:45 AM, and remained in his cell, E-17, until the doors were unlocked. He did not go to early breakfast and instead remained in the unit and showered and cleaned his cell. He stated he went to the TV room and watched several football games during the course of the day, including the Oklahoma/Nebraska game. He watched these games with inmates PEDRO FLORES and a white male who resides in "J" Unit in cell E-18. He did leave the unit briefly and went to the canteen line for approximately five minutes. He then went to the brunch at approximately 10:00 AM with the white inmate who resides in cell E-18, as previously mentioned. The brunch meal took approximately 25 minutes, and after that he went back to "J" Unit and continued watching the football games until approximately 2:00 PM. At 2:00 PM he went to the gym and worked out. He stated this could be verified by the black officer who was working in the gym on that afternoon.

After working out, he played shuffleboard with an inmate by the name of SAM, who resides in "C" Unit. He left the gym at approximately 3:00 PM and returned to "J" Unit.

Upon arriving in "J" Unit, he went to his cell and made coffee. He placed the time as approximately 3:15 PM. He remained in the unit until his unit received the chow call, at which time he went to the evening meal.

He advised he did not know about any stabbing until he was locked down in "I" Unit during the late evening on November 11, 1978.

REYNOSO admitted that he knew THOMAS ALBERT TREJO, having known him from San Quentin when they had served state time together. REYNOSO advised this was his first federal incarceration and he knew him from no other institutions.

REYNOSO advised he did not associate with CHINO OLVERA on November 11, 1978; however, he did admit knowing CHINO OLVERA. He also admitted knowing WILLIE GOUVEIA, who he stated he saw in the dining-room and with whom he had a short conversation. He could not remember specifically what was discussed and stated he might have also seen him in the corridor or the gym or the diningroom. He could not remember exactly where this conversation occurred or for how long.

He admitted knowing TONY PALACIOS, who he had met since arriving at Lompoc, however he did not remember seeing him on the Saturday in question.

He denied knowing an inmate by the name of STEVE KINARD, and after being shown a photograph of him, denied seeing him on the Saturday in question. He also advised he had met RICKY RESENDEZ, who had been locked in "I" Block with him on Saturday, November 11, 1978, however he did not associate with him prior to that.

At this point in the interview, REYNOSO said, "I can't account for anyone else's presence. I can't account for nobody but myself."

REYNOSO denied any involvement in the Mexican Mafia or any association with its members; however, he did admit that he had done some "crazy things" while in state custody when he was younger.

Interviewed On 11/21/78 at Lompoc, California

File # Los Angeles 70-1054

by: SA James R. Wilkins and

SA Robert J. Ladd

Date dictated: 11/28-78

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 12/15/78

An attempt was made to interview PHILLIP RALPH SEGURA, Inmate Number 14801-116, in the Apprehension Room, Federal Correctional Institution, Lompoc, California. This interview was attempted in the presence of Investigative Lieutenant JAMES J. COOKSEY.

Prior to any questioning, SEGURA was advised of the identity of the interviewing Agent, purpose of the interview, and was furnished with an "Interrogation; Advice of Rights" form, which he read. After reading this form, SEGURA refused interview and stated he had nothing to say.

Interviewed on: 12/6/78 at Lompoc, California File #Los Angeles 70-105

by: SA JAMES R. WILKINS/bef

Dated dictated 12/11/78

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

DECLARATION

JOEL LEVINE hereby declares and says as follows:

1. I am the attorney of record for defendant Philip Segura in Case No. Cr-80-535-MML.

2. Since July 28, 1980, when I first met Mr. Segura following my appointment as counsel by the Court, I attempted with him on numerous occasions to list the names of his defense witnesses, both alibi and otherwise. I have met with Mr. Segura four times for that purpose and spoken with the inmate locator in Washington, D.C. three times. Despite these efforts, the following difficulties have been encountered:

(a) Several potential witnesses are known to the defendant only by nickname. Since the defendant has been removed from these potential witnesses for almost two years, he cannot now find them with such limited information.

(b) Several potential witnesses of the defendant could not be found on the Lompoc inmate rosters supplied by the prosecution, some of which appeared to be for dates other than November 11, 1978.

(c) One of the alibi witnesses, Gary Lowe died at Lompoc of natural causes in January, 1980. Another, Michael Thompson, died at Springfield Federal Penitentiary in June, 1979, also of natural causes.

(d) One witness (alibi) has been released from federal custody in June, 1980 from McNeil Island. The inmate locator advised that I must write the Warden of that institution for assistance in learning of this inmate's current address, which I did on August 22, 1980.

(e) Another alibi witness was released from federal custody (from the Long Beach Community Treatment Center) in 1979. I am currently taking steps to locate his whereabouts.

(f) Three of the witnesses are incarcerated at federal prisons at Marion, Illinois, Leavenworth, Kansas, and Terra Haute, Indiana. Writs are currently being processed for these persons to bring them here for interview and testimony, with no guarantee that either will be possible on or before the trial date of this case.

3. On August 18, 1980, at hearings of discovery motions, the Court ordered the Government to provide me with records of both defendant Segura's administrative hearings at Lumpoc and his detention in the isolation unit relating to the charges in this case. At the time this Declaration is being drafted, those records have not been made available to me.

4. The above information is supplied in support of defendant Segura's motion to dismiss the indictment. The foregoing is true and correct, and I would be willing to testify as such under penalty of perjury if called upon to do so.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of August, 1980, at Los Angeles, California.

/s/

JOEL LEVINE

DECLARATION OF JOEL LEVINE

Joel Levine hereby declares and says as follows:

1. I am the attorney of record for Defendant Philip Segura in Case No. CR 80-535-MML.

2. On September 10, 1980, two days after the hearing of Defendant's motion to dismiss the indictment, I was provided by the Government with the Jenck's Act statements of the witnesses it intended to call in its case in chief. Between September 10 and September 12 of 1980, I read and digested information contained in the discovery material provided to me on September 10. It appeared to me from reading the material that the only inmate witness interviewed by the Government prior to the indictment in this case who gave admissible and incriminating evidence, implicating Defendant Philip Segura in the murder of Thomas Trejo, was one William Kenneth Giffin. Mr. Giffin was interviewed on three occasions by agents of the Federal Bureau of Investigation and provided detailed statements which were later recorded in FBI 302 interview forms. These forms indicate that Mr. Giffin was interviewed on November 27, 1978, November 29, 1978 and November 30, 1978.

3. In the previously submitted exhibits in support of Defendant Segura's motion to dismiss the indictment, it was indicated on forms compiled by the Bureau of Prisons that the FBI investigation implicating Defendant Philip Segura in the murder of Thomas Trejo was completed by December 13, 1978. The interviews and discovery material provided by the Government on September 10, 1980 confirmed that fact.

4. The only other evidence submitted to the grand jury in support of the indictment against Philip Segura were the scientific analyses performed by the FBI on a palmprint and a footprint, both of which are allegedly those of Defendant Segura, as found at or near the scene of the murder. This was the only evidence, other than Mr. Giffin's testimony, which is arguably admissible at trial and which was presented to the grand jury for purposes of securing an indictment.

I declare under penalty of perjury that the foregoing is true and correct and I would be willing to testify to the foregoing in open Court if called upon to do so.

Dated this 15th day of September, 1980, at Los Angeles, California.

/s/

JOEL LEVINE

DECLARATION OF PHILIP SEGURA

Philip Segura hereby declares and says as follows:

1. I am a defendant in Case Number CR 80-535-MML.
2. On October 20, 1978, I arrived at FCI, Lompoc, California, to serve a federal sentence.
3. On or about December 4, 1978, I was removed from the prison population and placed in an isolation unit, allegedly for being involved in the murder of Thomas Trejo. At the time I was placed in isolation, all of my personal belongings were taken from me. I was placed in isolation to await disciplinary proceedings and trial.
4. Several weeks later, I was taken to an administrative hearing within the prison where I was adjudged guilty of the murder of Thomas Trejo. Although I had requested the assistance of a lawyer, none was provided to me. I therefore was unable to locate witnesses for that hearing to prove my innocence.
5. Since then and until the indictment in this case (a period in excess of 18 months), I remained in isolation. Despite my requests for legal representation, none was provided. Also, because I was continuously in isolation, I was personally unable to contact inmates who could establish my presence elsewhere than at the murder scene on November 11, 1978. I am now first attempting to do that with great difficulty, because many of the inmates in my original unit at Lompoc in 1978 are elsewhere (either in other units, other prisons, or no longer incarcerated).¹

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of August, 1980, at Los Angeles, California.

/s/

PHILIP SEGURA
Declarant

¹ One of my potential alibi witnesses, Gary Lowe, died at Lompoc in January, 1980.

DECLARATION OF ROBERT RAMIREZ

ROBERT RAMIREZ hereby declares the following to be true and correct under penalty of perjury:

1. I am the Defendant in the above case and am currently being charged with the death of Thomas Trejo, which is alleged to have occurred on November 11, 1978;

2. That on November 11, 1978, after the death of Thomas Trejo, I was interviewed by the prison authorities for approximately one-half hour; at that interview, I was merely asked if I had any knowledge concerning the death of Thomas Trejo; the interview was a standard interview that was made of all prisoners in the institution concerning whether any inmate had information concerning the death of Thomas Trejo;

3. On December 4, 1978, I was interviewed a second time concerning the death of Thomas Trejo; at the conclusion of the interview, I was removed from the normal inmate population and placed into solitary confinement; while in solitary confinement; I was interviewed on three other occasions: on November 24, 1978, November 30, 1978 and December 4, 1978; attached as an exhibit to this declaration is a copy of the FBI summary of the December 4, 1978 interview; during that interview I was informed that I was a suspect in the murder of Thomas Trejo and in response to that accusation I requested to have an attorney;

4. From December 4, 1978 until mid-July of 1980, I was kept in solitary confinement at the Federal Correctional Institute at Lompoc; during that period of time, I was kept away from all other inmates in the institution and I was never provided with an attorney to assist me in investigating the case and in protecting my constitutional rights;

5. Ultimately on June 17, 1980, an indictment was returned against me alleging the crimes of conspiracy and murder; on July 14, 1980 I was brought to Court and for the first time an attorney was appointed to represent me on the murder and conspiracy charges;

6. On numerous occasions during the 20-month lock-down period, I was told by prison authorities that I would be go-

ing to court on a charge of murdering Thomas Trejo; on numerous occasions throughout my 20-month lock-down period, I requested an attorney;

7. During the 20-month lock-down period, two separate hearings were held in the prison concerning the charge that I was responsible for the murder of Thomas Trejo; the first hearing was a disciplinary hearing held approximately one and one-half weeks after I was placed in solitary confinement; at the hearing I was told that I had been accused of causing the death of Thomas Trejo and I was asked if I had anything to say; at the conclusion of the hearing, I was informed that I had lost all of my good time and would be transferred to Leavenworth Penitentiary;

8. The second hearing occurred before the Institutional Disciplinary Committee approximately four weeks after I had been placed in solitary confinement; I was informed that the Committee would be meeting because it was alleged that I had been involved in the murder of Thomas Trejo; the Committee members asked me if I had any witnesses; I requested that I be provided with an attorney and that I would not participate in the meeting and would make no statement concerning my witnesses until I spoke with an attorney; at the conclusion of the hearing, I was again informed that I had lost all of my good time and that I would be transferred to Leavenworth Penitentiary;

9. On a third occasion during the 20-month period of solitary confinement, approximately two months after my solitary confinement began, I was brought before an additional committee to determine whether I should be transferred to a special Marion Control Unit; this Control Unit was for prisoners who were too dangerous to be kept in the general prison population; at the hearing I requested that I be provided with an attorney prior to the start of the hearing, but I was informed that I had no right to an attorney at the hearing; the committee members then questioned me concerning the murder of Thomas Trejo; I refused to answer any questions on the grounds that I had not been provided an attorney; at the conclusion of the hearing, I was provided with a written report stating that I was a threat to the prison population and would be transferred to the Marion

Control Unit; in effect, I had been found guilty of the murder by all of the three foregoing committees;

10. Written documentation of the results of all of the foregoing hearings were provided to me; all of those documents are in my property and have been transferred by the prison authorities to Marion, Illinois; at the present time I have not been provided with additional copies of those documents which the Government has indicated they have;

11. That during the 20-month period of solitary confinement, between December 4, 1978 and July 14, 1980, I was kept away from all other inmates at the institution and was unable to contact any potential witnesses within the inmate population who could verify my whereabouts on the day of Mr. Thomas Trejo's death;

12. There were four inmates at the Federal Correctional Institute at Lompoc whose full names I do not know who could verify that on November 11, 1978 at the time of the death of Thomas Trejo that I was in the gymnasium at the prison; these four persons were known only to me as "Abalone", "Jose", "Paharo" and "Jesus R.C."; it is now almost two years since the death of Thomas Trejo and I am unable to determine the identity of these persons or their present location; there are also two other inmates by the names of David Jaramillo and Alberto Rosas who were also present in the gymnasium on November 11, 1978 at around the same time that I was at the gymnasium; these witnesses could testify concerning my whereabouts on the day of the death of Mr. Trejo; however, I am informed and believe that one of those inmates have since died.

Dated this ____ day of August, 1980, at Los Angeles, California.

/s/

ROBERT RAMIREZ

FEDERAL BUREAU OF INVESTIGATION

Date of transcription: 12/14/78

ROBERT RAMIREZ, Inmate Number 17160-148, was interviewed at the Federal Correctional Institution (FCI), where he is currently incarcerated. RAMIREZ was interviewed in the presence of Investigative Lieutenant JAMES J. COOKSEY, FCI, Lompoc.

Prior to any questioning, RAMIREZ was once again advised of the identity of the interviewing Agent and that a clarification of certain facts was needed of him regarding his previous interviews. RAMIREZ was very hostile at the outset of the interview and claimed that the interviewing Agent and the Investigative Lieutenant were "putting him out front and attempting to front him off" to the killers of THOMAS TREJO. He could not explain his concern other than to say since he was a friend they might think he was providing information about them. RAMIREZ, however, could not explain the "them" he was referring to.

RAMIREZ again advised that on the morning of November 11, 1978, he awoke at approximately 7:00 AM and went to breakfast with three inmates, one by the name of JESUS, who is the only Mexican who plays tennis, and goes by the initials "RC". The other inmate identified as SAL is the orderly in "F" Unit. He could not recall the other inmate who he went to breakfast with; however, upon being reminded by the interviewing Agent that he had previously indicated this individual to be PELON, he advised that that was correct and that PELON's name was ROBERT.

Interviewed on: 12/4/78 at Lompoc, California File #Los Angeles 70-10548

by: SA JAMES R. WILKINS/bef

Date dictated: 12/8-78

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EXHIBIT A

RAMIREZ advised that he went to the recreation yard when it was opened and that he had worked out and walked the track. He related that he seen THOMAS TREJO on that morning and had in fact seen him in bed when RAMIREZ had left the unit.

RAMIREZ stated that after being on the yard for some time, it began raining and he came into the institution. He had brunch, as previously stated, saw THOMAS TREJO entering the chow hall at approximately 11:30 AM, and thereafter went to the gymnasium. At the gymnasium, there was a basketball game in progress between several Chicanos and black inmates, and he assisted a black inmate by the name of DAVID, who was keeping score.

Once again RAMIREZ was questioned regarding the activities of several of the individuals who are suspects in the homicide of THOMAS ALBERT TREJO, and he provided the following:

He did not recall whether or not he saw TONY PALACIOS on the morning of November 11, 1978. He related that he remembers seeing WILLIE GOUVEIA sometime during the day and believes that he possibly walked with him in the main corridor. He vehemently denied any association with CHINO OLVERA. Regarding ADOLPH REYNOSO, he advised he saw him, however, was not with him during the day, did not work out with him in the yard or gymnasium on that day, and did not associate with him in the hall. Regarding PETE FLORES, RAMIREZ advised that he is a friend of CHINO OLVERA and therefore he does not associate with him. He denied being with RICARDO RESENDEZ on Saturday, November 11, 1978.

RAMIREZ advised that he did not go into "M" Unit on that Saturday; however, he might have gone to the door, but did not go inside. He could not recall as to why he might have gone to the door of "M" Unit other than to possibly speak to some inmates on the inside. At this point, RAMIREZ advised that when he had initially come to FCI, Lompoc, in July, 1978, that he had resided in cell A-18 for a few weeks. He explained this was the last cell on the lefthand side in "M" Unit.

RAMIREZ advised that he had previously been incarcerated at Terminal Island, California, in 1973 and had been transferred to Leavenworth, Kansas, in 1976 following an altercation wherein he had come to the assistance of his cousin, PABLO VILLAREAL, who had been the victim of an assault. RAMIREZ advised that VILLAREAL was attacked by a "crazy inmate" with a knife, and that he (RAMIREZ) had hit this inmate over the head with a chair.

At this point, a telephone call was received in the interview room indicating that inmates ADOLPH REYNOSO, PHILLIP SEGURA, and PEDRO FLORES had been locked up in the Segregation Unit for investigation of the murder of THOMAS ALBERT TREJO. RAMIREZ was advised of this fact and initially denied knowing any inmate by the name of PHILLIP SEGURA. RAMIREZ quickly became agitated and animated and began yelling that the FBI had doublecrossed him and fronted him off to these individuals. He again denied, however, why he was fearful of these individuals and again stated he knew nothing of the murder of THOMAS ALBERT TREJO. He did make the admission, however, that just prior to being interviewed by the FBI that he had been talking to "BLACK" and that now "they" would think that he was providing information to the FBI. He again accused the interviewing Agent of "setting him up", and he advised he would make sure "his family" found out about it.

At this point, RAMIREZ was advised of his rights through use of an "Interrogation; Advice of Rights" form by SA WILKINS. At this point, SA WILKINS advised RAMIREZ that he, RAMIREZ, was considered a prime suspect in the homicide of THOMAS ALBERT TREJO, at which point RAMIREZ advised that he wished to have an attorney present and that he had nothing further to say to the FBI. At this point, the interview was terminated and RAMIREZ was escorted to the Segregation Unit by FCI staff.

STILZ, BOYD, LEVINE & HANDZLIK

Attorneys at Law
Two Century Plaza
22049 Century Park East, Suite 1200
Los Angeles, California 90067
(213) 277-6844 or 879-0662

Attorneys for Defendant Philip Segura

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR-80-535-MML

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ADOLPHO REYNOSO, aka "CHAMP", ROBERT RAMIREZ,
aka "BLACK BOBBY", WILLIAM GOUVEIA, aka "WILLIE
BOBO", PEDRO FLORES, aka "BLACK PETE", PHILIP
SEGURA, aka "BLACK", STEVEN KINARD, DEFENDANTS.

EXHIBITS IN SUPPORT OF DEFENDANT
PHILIP SEGURA'S PREVIOUSLY NOTICED MOTION
TO DISMISS INDICTMENT

Defendant Philip Segura hereby submits, in support of
the previously noticed Motion to Dismiss the Indictment,
the following exhibits received on August 29, 1980 from the
United States Attorney:

EXHIBIT 1: Incident Report dated December 13, 1978 (2
pages)

EXHIBIT 2: Request for Administrative Remedy dated
January 10, 1979.

Respectfully submitted,

STILZ, BOYD, LEVINE & HANDZLIK

By Joel Levine

JOEL LEVINE

Attorneys for Defendant Segura

INCIDENT REPORT

Cl. Lompoc, Ca.

PART I - INCIDENT REPORT

2 NAME OF INMATE SEGURA, PHILLIP R.	3 REGISTER NUMBER 14801-116L	4 DATE OF INCIDENT 11 Nov 78	5 TIME 12:30 PM
6 PLACE OF INCIDENT "M" Unit	7 ASSIGNMENT F/S	8 QUARTERS "L" Unit	
9 INCIDENT KILLING MAKING PLANS TO COMMIT A KILLING			10 CODE 001 801
11 DESCRIPTION OF INCIDENT Based on confidential information and inmate interviews, you did on 11 Nov 78, participate in the fatal stabbing of inmate TREJO, THOMAS A., Reg. No. 35025-136. This murder took place in "M" Unit at approximately 12:30 PM, you were assisted by not less than six other inmates, of which ten others, along with you did also stab the victim.			
12 SIGNATURE OF REPORTING EMPLOYEE <i>[Signature]</i>		13 NAME AND TITLE (PRINTED) J. COOKSEY, INV. CS	
14 INCIDENT REPORT DELIVERED TO ABOVE INMATE BY <i>[Signature]</i>		15 DATE INCIDENT REPORT DELIVERED 12-12-1978	16 TIME INCIDENT REPORT DELIVERED 2:00 PM

PART II - COMMITTEE ACTION

17 COMMENTS OF INMATE TO COMMITTEE REGARDING ABOVE INCIDENT		
18 IT IS THE FINDING OF THE COMMITTEE THAT, IF APPLICABLE BOX: <input type="checkbox"/> YOU COMMITTED THE PROHIBITED ACT AS CHARGED. <input type="checkbox"/> YOU COMMITTED THE FOLLOWING PROHIBITED ACT: <input type="checkbox"/> YOU DID NOT COMMIT A PROHIBITED ACT		
19 COMMITTEE FINDINGS ARE BASED ON THE FOLLOWING INFORMATION		
20 COMMITTEE ACTION		
21 DATE OF ACTION		
CHAIRMAN	MEMBER	MEMBER

STATEMENT AND ATTITUDE

So I did not participate in this killing. I was either in my unit or on the yard. I was in my unit watching the football game. I was not in or around M-Unit at any time. I didn't know anything about it until around 3:00 P.M. as I was in the corridor going to my unit, I was coming from the movie after it was over. Also I was watching the movie with a friend, Joe Russell # 14235-148. I did go before from San Quinton, but he was always by himself. I do not belong to the gangs. I never did get involved in them. I have no idea of why anyone would want to get in something like this, but they try to do this type of thing at San Quinton.

Attitude was good.

OTHER FACTS ABOUT THE INCIDENT

On Dec-13-1975 the F.B.I. completed their investigation of this incident and did refer the report back to the inst. for their investigation and disposition this date.

INVESTIGATOR'S COMMENTS AND CONCLUSIONS

Due to the investigation of the F. B. I. and the investigating supervisor of this institution I feel the report is true as written.

Investigation by the F.B.I. and the institution's supervisor indicates that inmate Segura did participate in the assault on inmate Trejo. the information received by them is available as requested and needed.

ACTION TAKEN

Inmate Segura was placed in I-Unit on 12-04-1978 pending investigation by both ~~investigative supervisor~~ the F.B.I and the investigative Supervisor.

Investigation completed this date (13 Dec 1975) and now referred to the unit team for disposition.

O. J. Guss.

SIGNATURE

Correctional Supervisor.

TITLE

FEDERAL BUREAU OF PRISONS

REQUEST FOR ADMINISTRATIVE REMEDY

INSTRUCTIONS:
TYPE OR USE BALL POINT
PEN. IF MORE SPACE IS
NEEDED, USE ATTACHMENT
SHEET IN QUADRUPPLICATE.

To: _____ Warden of Institution
_____ Regional Director, Bureau of Prisons

From: SECURE PRISON R. 14801-116 FBI CAMPDC
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. INSTITUTION

Part A—INMATE REQUEST

On Dec. 21, 1978 I was found guilty of I.D.C. of Code 116-116. The decision in this matter was unfair since I had no legal counsel to represent me in this hearing. Although the prisoner does not generally have right to counsel at disciplinary hearings, he does where the disciplinary is based upon allegations of murder. A great injustice is being done to me in this matter for I am not guilty. Your confidential sources is not enough to find guilty in this matter, why is it that all of sudden you have such sources after almost a month passed before I was charged for this? I feel I'm being used as an escape route for your sources and also being used to clean up your faults.

1-19-79

Phillip R. Simon 14801-116

SIGNATURE OF REQUESTOR

Part B—RESPONSE

Your allegation that on 12-21-78 that you were found guilty before an IDC hearing unjustified because you were not afforded the right to have counsel has been investigated. This was not a judicial hearing. It was an administrative hearing conducted in accordance with policy statement 7400.4-239 on Inmate Discipline. As to your question as to why a month's delay from the time of the incident, this was an on-going investigation and as evidence was accumulated and the suspects identified, then the appropriate action was taken. I further find that at no time during the proceedings were your rights violated in accordance with current policy. Therefore, your request for adm. remedy is denied.

1-30-79

DATE

DEPARTMENT HEAD OR REPRESENTATIVE

WARDEN, ASSOCIATE, OR REGIONAL DIRECTOR

FIRST COPY: FOR OFFENDER'S CENTRAL FILE AFTER COMPLETION.

Part C—RECEIPT

Return to: SECURE PRISON R. 14801-116 FBI
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. INSTITUTION

I acknowledge receipt this date of a complaint from the above inmate in regard to the following subject:

Prostitution 100 decision of 12-1-78

DATE

RECEIVED BY (NAME AND MEMBER)

CENTRAL FILE

STILZ, BOYD, LEVINE & HANDZLIK

Attorneys at Law
Two Century Plaza
22049 Century Park East, Suite 1200
Los Angeles, California 90067
(213) 277-6844 or 879-0662

Attorneys for Defendant Philip Segura

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR-80-535-MML

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ADOLPHO REYNOSO, aka "CHAMP", ROBERT RAMIREZ, aka
"BLACK BOBBY", WILLIAM GOUVEIA, aka "WILLIE BOBO",
PEDRO FLORES, aka "BLACK PETE", PHILIP SEGURA, aka
"BLACK", STEVEN KINARD, DEFENDANTS.

NOTICE OF ALIBI

Pursuant to Rule 12.1 of the Federal Rules of Criminal Procedure, defendant Philip Segura hereby gives notice of his intent to rely upon the defense of alibi in the above-entitled matter.

At the time of the alleged offense, defendant Segura was in one of several other locations than "M" Unit at F.C.I., Lompoc, California, those locations being "L" Unit or the prison yard.

Defendant Segura will rely on the testimony of the following persons currently known to him to help establish this defense:

Philip Segura (Los Angeles County Jail)
Joseph Roselli (address unknown)
Robert Carillo (address unknown)
Alex Trujillo (F.C.I. Lompoc)
Percy David (F.C.I. Lompoc)
Richard Wilkerson (F.C.I. Lompoc)

Inmate named "Roger" (address unknown)

Inmate named "Hat"(address unknown)

Steven Romero (F.C.I. Lompoc)

Respectfully submitted,

STILZ, BOYD, LEVINE & HANDZLIK

By Joel Levine

JOEL LEVINE

Attorney for Defendant Segura

MICHAEL J. TREMAN
Attorney at Law
8 E. Figueroa, Ste. 230
Santa Barbara, CA 93101
(805) 962-6544, 963-3569
Attorney for Defendant
WILLIAM GOUVEIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 80-535-MML

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ADOLPHO REYNOSO, WILLIAM GOUVEIA, ET AL., DEFENDANTS.

**DECLARATION OF WILLIAM GOUVEIA IN SUPPORT OF
MOTION TO DIMISS THE INDICTMENT OR IN THE
ALTERNATIVE TO EXCLUDE EVIDENCE**

DATE: September 8, 1980

TIME: 2:00 p.m.

I, WILLIAM GOUVEIA, declare:

I am a defendant in the above captioned matter and am presently incarcerated in the Los Angeles County Jail.

On November 11, 1978, I was an inmate in the general population of the Federal Corrections Institute, Lompoc, California. At approximately 8:00 p.m. I was removed from my cell and placed in solitary confinement ("segregation," "the hole") in the unit designated I-unit. At that time I received a memo stating that I was placed in segregation pending investigation or trial for crimes committed in the institution.

It is my recollection that I received another memorandum on December 6, 1978, advising me that I was being held in administrative detention pending investigation of the murder of Thomas A. Trejo. I was advised in the memo that inmate interviews and confidential information indicated my involvement in the killing. I was further advised

that once the F.B.I. notified the prison officials that administrative action was appropriate an incident report would be prepared and processed.

Prior to receipt of the December 6, 1978 memo, I was interviewed by the F.B.I. In the process of the interview I was advised that I had a right to an attorney's advice before the interview and that one would be provided if I so requested. Although I did agree to talk to the F.B.I. at that time without an attorney, once I received the memo I requested counsel through institutional channels and, I believe, I made written requests to the Santa Barbara County Public Defender's Office in Lompoc. I was advised by both these sources that I could not have an attorney.

I agreed to talk to the F.B.I. because that interview was my first opportunity to try and clear myself. Prior to my interview I was advised that several inmates, in addition to the defendants in this case, were placed in solitary in connection with Mr. Trejo's death. They were subsequently returned to the main prison population, which implied to me that they were able to provide information to the F.B.I. which cleared themselves.

I received an "Incident Report" on December 13, 1978, a copy of which is attached hereto as Exhibit "A". I was subsequently taken before the Unit Disciplinary Committee on December 15, 1978 (I believe) and they forwarded the matter to the Institution Disciplinary Committee on December 21, 1978. The Institution Disciplinary Committee refused to provide me with an attorney or any information concerning the nature or source of the evidence against me. I was simply informed that all the evidence was confidential. The action taken included loss of all good time, approximately 260 days and continued solitary confinement.

During the period of time I was in solitary at Lompoc and at other institutions, the conditions of my confinement were greatly changed. I no longer had direct contact with other prisoners. I could not go to my work assignment in the food service. I could no longer go to movies, watch television, participate in craft or educational programs and my physical exercise was restricted to one hour every seven days. I was physically confined to my individual cell, instead of be-

ing able to move about the prison or the unit most of the day. My contacts with persons outside the institution were reduced to one telephone call per month from a phone always available in my unit; my visiting hours were reduced to two hours or less per visit from 3½ hours on week days and 7½ hours on weekends; and at one time, shortly after I was placed on solitary, the Lompoc institution refused to permit me any visitation. In solitary confinement I was also limited in the type of items I could purchase from the commissary and the clothing I could wear.

Prior to my being placed in solitary I enjoyed reputation as a person who minded his own business within the inmate prison population. After being placed in solitary for this case questions were raised concerning whether I was an informer and I have heard of threats upon my life by persons in the Federal Prison system who knew Mr. Trejo.

Once I was placed in solitary at Lompoc, I advised my family of the nature of the F.B.I. investigation. Both my relatives and myself discussed at that time concerns for my personal safety and treatment at the hands of the institution. Those concerns have continued through to the present time.

I left from "the hole" in Lompoc on my way to Leavenworth either the 29th or 30th of January. From Lompoc I went to Terminal Island, where I was taken to "the hole" and placed in an area called the "ice box" for two weeks. I wasn't allowed any phone calls or visits. From there they took me to Florence, Arizona and placed in "the hole" overnight. Then I was taken the next day to La Tuna and placed in "the hole" there for about a week to a week and a half. Then I was taken to El Reno and placed in "the hole" for a week. Then from there I was taken to Leavenworth. I got to Leavenworth in the first week of March and was placed in "the hole." After two days in "the hole" I was taken in front of their I.D.C. committee and told what I was doing there, that I should be in Marion. They let me out of "the hole" that afternoon. They asked me if I was going to be indicted on the murder, and I told them I didn't know what was going on. Six months later they sent me to Marion. I was at Marion until they brought

me back for court. The day I left Marion I didn't know I was leaving til two hours before the bus picked me up, and all they told me was that I was leaving for Los Angeles on a writ.

I was first advised on the filing of this indictment on my way to Los Angeles from Marion. Therefore, I left all my records on what happened in Lompoc in my personal property at Marion. Although the government has promised to provide this material to my attorney, only the Incident Report, Exhibit "A", has been provided to date. My recollection of where I was on November 11, 1978, and who might be a witness for my defense is greatly hampered by the time which has transpired to the indictment of this case. The F.B.I. transcript of my interview in December of 1978 does contain some information to help me. I have reviewed the lists of other persons in both my unit and the institution in November of 1978 in any effort to try and trigger my memory, but in most cases I only knew inmates by nicknames and the lists do not contain that information. Also, in some cases, the lists contain information which is completely different from my recollection, such as the location within the institution of persons I knew. My attorney has also provided me with copies of the administrative reports which have been submitted by other defendants in this case and discussed them with me in order to help me recreate what took place in my case. This process has helped my recollection as to some points, but as to many things, such as my request for legal assistance to Santa Barbara County Authorities, I have only vague recollections or impressions.

I declare under penalty of perjury that the foregoing is true and correct. Executed this ____ day of September, 1980, at Los Angeles, California.

/s/

WILLIAM GOUVEIA

U. S. DEPARTMENT OF JUSTICE
 BUREAU OF PRISONS
 INCIDENT REPORT

 1. NAME OF INSTITUTION
 FCI, Longoc, Ca.

PART I. INCIDENT REPORT

2. NAME OF INMATE GOUVIA, WILLIAM	3. REGISTER NUMBER 13739-116K	4. DATE OF INCIDENT 11 Nov 78	5. TIME 12:30 PM
6. PLACE OF INCIDENT "M" Unit	7. ASSIGNMENT F/S	8. QUARTERS K Unit	
9. INCIDENT Aiding Another Person in a Killing Assault Possession of a Sharpened Instrument			10. CODE 801 002 202

11. DESCRIPTION OF INCIDENT

Based on confidential information and inmate interviews, you did on 11 Nov 78 participate in the fatal stabbing of inmate TREJO, THOMAS A., Reg. No. 35025-136. This murder took place in "M" Unit at approximately 12:30 PM, you were of assistance to three other inmates who did the actual stabbing, by furnishing weapons to them, disposing of bloody clothing for them, and standing guard so that they would not be interrupted, as well as disposing of weapons after the act was committed.

12. SIGNATURE OF REPORTING EMPLOYEE

13. NAME AND TITLE (PRINTED)

J. COOKSEY, Inv. CS

14. INCIDENT REPORT DELIVERED TO ABOVE INMATE BY

15. DATE INCIDENT REPORT DELIVERED

12 Dec 78

16. TIME INCIDENT REPORT DELIVERED

1:30 PM

PART II. COMMITTEE ACTION

17. COMMENTS OF INMATE TO COMMITTEE REGARDING ABOVE INCIDENT

18. IT IS THE FINDING OF THE COMMITTEE THAT (X) APPLICABLE BOX

☐ YOU COMMITTED THE PROHIBITED ACT AS CHARGED

☐ YOU COMMITTED THE FOLLOWING PROHIBITED ACT:

☐ YOU DID NOT COMMIT A PROHIBITED ACT

19. COMMITTEE FINDINGS ARE BASED ON THE FOLLOWING INFORMATION

20. COMMITTEE ACTION

21. DATE OF ACTION

CHAIRMAN

MEMBER

MEMBER

PART III - INVESTIGATION

22. DATE

13 Dec 78

INMATE STATEMENT AND ATTITUDE

Inmate Gouvia alleges he has no knowledge of the incident and definitely did not participate in any part of the assault. He alleges that at 12:30 PM he was in Unit shooting the bull with different inmates on the unit's flats. States there are three witnesses: JACKIE, DANNY ARMY and that these are the only names he knows them by. He admits he had met inmate Trejo here in the main corridor the first evening he was here, but didn't know him. Had nothing else to say.

OTHER FACTS ABOUT THE INCIDENT

This report was released by the FBI back to the institution on 13 Dec 78 for their investigation and disposition.

Inmate Kinard #20159-168(K) alleged that he had seen inmate Gouvia in the Gym at approximately 12:30 PM, and had named him as a witness to verify his whereabouts at the time of the stabbing.

INVESTIGATOR'S COMMENTS AND CONCLUSIONS

Investigation by the FBI and the Institution's Investigative Supervisor indicates that inmate Gouvia did participate in the assault on inmate Trejo. The information received by them is available as requested and needed.

ACTION TAKEN

Inmate Gouvia was placed in I-Unit on Nov 11, 1978 pending investigation by both the FBI and the Investigative Supervisor. Investigation completed this date (13-Dec-78) and now referred to the unit team for disposition.

P. Mims
SIGNATURE

Correctional Supv.
TITLE

DECLARATION OF JAMES R. WILKINS

I, JAMES R. WILKINS, declare under penalty of perjury:

1. I am a Special Agent with the Federal Bureau of Investigation and was so employed in November 1978.

2. On November 11, 1978, I received a telephone call informing me of the brutal murder of Thomas "Hopppo" Trejo that day in Cell A18 of "M" Unit at Lompoc Federal Correctional Institution. I also learned on that day from FCI officials that the suspected murders of Thomas Trejo were members of the Mexican Mafia, a prison gang each of whose members must have killed somebody in order to gain membership. I was informed that all known Mexican Mafia members at FCI, Lompoc were placed in the Administrative Detention Unit ("ADU") pending investigation of the murder. This included Adolpho "Champ" Reynoso, Pedro "Black Pete" Flores and William "Willie Bobo" Gouveia.

3. On or about November 22, 1978 these defendants were released from the ADU and returned to the general population. They were returned to the ADU by FCI officials on December 4, 1978, when additional information tying them and defendants Robert "Black Bobby" Ramirez, Phillip "Black" Segura and Stevin Kinard to the murder of Thomas Trejo was obtained.

4. Beginning November 11, 1978, I and FBI Special Agents Robert Ladd, Thomas Mansfield and other FBI agents conducted interviews of in excess of 100 witnesses regarding the Trejo murder. Several witnesses were interviewed more than once. In addition, I prepared and caused to be sent to the FBI laboratory in Washington, D.C. large quantities of tangible evidence found at the scene of the murder.

5. On November 29, 1978, as a result of an interview with a prison inmate, I identified the defendants in this case as the possible murderers of Thomas Trejo. I called the United States Attorney's Office, Los Angeles and related the state of the investigation to Assistant United States Attorney Bert H. Deixler. Deixler informed me that the United States Attorney's Office would open a file on the murder and that he would be assigned to the investigation.

On January 2, 1979, I sent the first written communication regarding this case to Assistant United States Attorney Deixler.

6. Prior to my first contact with the United States Attorney's Office, I had interviewed Adolpho Reynoso (on November 21, 1978), Pedro Flores (on November 21, 1978), and Robert Ramirez (on November 14, 1978 and November 20, 1978). In none of these interviews did any of these individuals make any statement about wishing to speak with an attorney.

7. On December 4, 1978, I interviewed Robert Ramirez. On December 6, 1978, I interviewed William Gouveia after he executed a waiver of his constitutional rights. Phillip Segura and Steven Kinard refused to be interviewed by me.

8. From January to May 1979 I conducted interviews of potential witnesses, awaited the results of requests to interview other witnesses to be transmitted from other FBI agents and awaited the results of the FBI lab investigation. Also during this period I participated in interviews with persons who were scheduled to testify in the Federal Grand Jury.

9. On or about May 10, 1979, I received a report from the FBI Laboratory which stated that, among other things, a piece of paper taken from the murder scene bore the fingerprint and palm print of William Gouveia. In that report, I was informed that the FBI laboratory required additional fingerprint exemplars of Adolpho Reynoso, Robert Ramirez, Steven Kinard and Phillip Segura.

10. From May to August I again conducted witness interviews and awaited the results of investigative requests I had sent to other FBI offices.

11. On or about August 4, 1979, I received another report from the FBI laboratory regarding certain tangible evidence sent for examination.

12. Throughout the period from November 1978 until June 1980, I spent considerable time contacting Bureau of Prisons and Department of Justice officials to ensure that witnesses who cooperated with the FBI investigation were protected.

13. On or about November 1, 1979 after defendants Reynoso, Ramirez, Segura and Kinard provided fingerprints at the direction of the Federal Grand Jury, and presumably upon the advice of counsel, who had been provided to each of them, I sent these fingerprints to the FBI Laboratory in Washington, D.C.

14. On or about February 1, 1980, I received an additional report from the FBI Laboratory informing me that the palm print of Phillip Segura was found on a piece of paper removed from the scene of the murder.

15. On or about August 11, 1980, I received an additional report from the FBI regarding tests made by the laboratory.

16. At all times I conducted this investigation diligently and with the view not only to prosecuting the guilty, but ensuring that no innocent person was charged with murder. I at no time delayed to obtain any tactical advantage, in fact, it was my strong desire to conclude this matter as quickly as possible and move on to something new.

17. Appended to this Declaration as Exhibits A-F are memoranda of interview prepared by me of my conversations with each defendant.

The foregoing is known to me of my personal knowledge, and if called upon to testify I would do so competently.

This Declaration has been read to me by Assistant United States Attorney Bert H. Deixler and I have directed him to sign it on my behalf. EXECUTED: This 3rd day of September, 1980.

/s/ James R. Wilkins, BMD

JAMES R. WILKINS
Declarant

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 12/15/78

WILLIAM ANSELM GOUVEIA, Inmate Number 13739-116, was interviewed in the Apprehension Room at the Federal Correctional Institution (FCI), Lompoc, California, in the presence of Investigative Lieutenant JAMES J. COOKSEY. Prior to any questioning, GOUVEIA was advised of the identity of the interviewing Agent, the purpose of the interview, and was furnished with an "Ingerrogation; Advice of Rights" form, which he read and signed.

GOUVEIA advised that on the morning of November 11, 1978, he awoke at approximately 8:00 AM, before yard time. He left the unit where he resides, which is "K" Unit, cell B-14, and went to the recreation yard where he lifted weights. He advised that in the immediate area watching the weighlifting was an inmate he knew by the name of STEVE KINARD. After he lifted weights, GOUVEIA walked the track and watched several inmates playing handball on the recreation yard.

He walked back into the institution shortly before 9:00 AM and returned to his unit, where he cleaned his cell and watched TV until the unit was released for brunch. He was observed watching TV by an inmate named PACKARD, and another inmate named DANNY, who resides in cell B-11 of "K" Unit. "K" Unit was called for brunch sometime between 10:30 and 11:00 AM, and he went to brunch with STEVE KINARD. At the chow hall, he ate at a table with STEVE, CHAMP REYNOSO, and PETE FLORES. He calculated that the meal took approximately one half hour to eat, and that after he finished eating he went to the gym and watched a basketball game. After watching this basketball game, he went to the pool tables and watched inmates playing pool. He went down the stairs in the gym and began walking the main corridor. While walking the corridor, he saw STEVEN KINARD again, CHINO OLVERA, who was returning from eating, and SAM, an inmate in "C" Unit.

He related he walked back to his unit, watched TV again for a short while, and came out for movie call at approximately 1:00 PM. Enroute to the movie he again saw SAM and CHINO, who was going to a visit. GOUVEIA advised he only stayed in the movie for approximately one half hour and then left the movie and returned to the gym, where he continued watching the basketball game. While in the gym on this occasion, he was observed by STEVE BROUGHTON (phonetic), who he identified as being the SAM from "C" Unit. At approximately 2:00 PM, he returned to the unit and remained in his unit the rest of the day. While in the unit, he again was observed by DANNY (last name unknown). He did not leave the unit until his unit was called for the evening meal, and he went to the chow hall where he ate with STEVE KINARD, PETE FLORES, CHAMP REYNOSO, and PHILLIP SEGURA. After eating, he returned to "K" Unit and remained there until he was locked down during the late evening.

GOUVEIA advised that he knew THOMAS ALBERT TREJO from FCI, Lompoc. GOUVEIA advised that he had been at McNeil Island in December, 1977, and that he, GOUVEIA, had not gotten to Lompoc until October, 1978.

GOUVEIA related that he had observed BLACK BOBBY (ROBERT RAMIREZ) on Saturday, November 11, 1978, on the yard shortly before brunch, and believed that he had passed him in the corridor and in the gymnasium. He stated he also saw TONY PALACIOS on that day on the yard or in the corridor by the movie after the movie had started. He stated he also saw him in the gymnasium during one of his visits there. GOUVEIA advised that he also knows RICKY RESENDEZ and also saw him on that day around the institution, either in the yard or in the corridor, and stated he recalls seeing him with STEVE KINARD.

GOUVEIA stated he did not go into "M" Unit at all on Saturday, November 11, 1978, and was not involved in any way with the homicide of THOMAS ALBERT TREJO. He stated he did not know any of the participants in this homicide and would provide no information regarding the homicide even if he knew.

Interviewed on 12/6/78 at Lompoc, California

File # Los Angeles 70-10548
by SA JAMES R. WILKINS/bef
Date dictated 12/11/78

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EXHIBIT E**FEDERAL BUREAU OF INVESTIGATION**

Dated of transcription 12/15/78

An attempt was made to interview PHILLIP RALPH SEGURA, Inmate Number 14801-116, in the Apprehension Room, Federal Correctional Institution, Lompoc, California. This interview was attempted in the presence of Investigative Lieutenant JAMES J. COOKSEY.

Prior to any questioning, SEGURA was advised of the identity of the interviewing Agent, purpose of the interview, and was furnished with an "Interrogation; Advice of Rights" form, which he read. After reading this form, SEGURA refused interview and stated he had nothing to say.

Interviewed on 12/6/78 at Lompoc, California

File # Los Angeles 70-10548

by SA JAMES R. WILKENS/bef

Date dictated 12/11/78

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EXHIBIT F

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/24/78

ROBERT BERNAL RAMIREZ, also known as Bobby, was interviewed at the Federal Correctional Institution (FCI), where he is an inmate. RAMIREZ advised he is 28 years old and is assigned to the "F" Unit at FCI, and he resides on the "E" Range in cell #3.

RAMIREZ recalled that THOMAS TREJO lived in the "F" Unit for a couple of days prior to his murder. He acknowledged that he was a good friend of TREJO and first met him in 1970 when TREJO was a youth counselor at a youth center at Santa Fe Springs, California. RAMIREZ stated he is also well acquainted with TREJO's wife. He added that he was acquainted with TREJO at the U.S. Penitentiary, McNeil Island, Washington, in 1976. Ramirez advised he did not visit with TREJO when TREJO was assigned to the "M" Unit at FCI, and he did not know where TREJO lived in the "M" Unit.

On November 11, 1978, he got up at about 7:00 AM and went down to see if TREJO was awake, however TREJO was asleep. RAMIREZ ate brunch in the dining hall sometime between 11:15 AM and 11:30 AM. As he departed the dining hall, TREJO was entering the dining hall alone. TREJO looked like he had just gotten out of bed and he made the remark, "I just woke up." At that time TREJO was wearing prison issue clothes, and RAMIREZ did not observe anyone follow TREJO into the dining hall.

RAMIREZ went to the recreation yard and took a walk, then went to the gymnasium and worked out with weights. He kept score for a basketball game in the gymnasium, returned to the "F" Unit, and watched a football game on television.

From his cell on the "E" Range he could look down and into TREJO's cell on the "D" Range, and at count time he did not observe TREJO in his cell. He thought that TREJO had a visit and that was the reason he was not in his cell.

That evening, while eating dinner, an inmate remarked to him that TREJO had been killed. He does not recall the identity of the inmate who made the remark.

RAMIREZ advised that TREJO was referred to at FCI as THOMAS or HOPPO. RAMIREZ advised that TREJO was not "strung out" on narcotics.

Concerning FCI inmate ADOLPH REYNOSA, RAMIREZ advised he has known REYNOSA for about three weeks since REYNOSA's arrival at FCI. RAMIREZ indicated he is the photographer for the "F" Unit and he takes pictures of many inmates in FCI. Because of this job, he knows just about everybody at FCI. RAMIREZ gave a photograph of himself to REYNOSA as REYNOSA is from Los Angeles and REYNOSA indicated his wife had a girlfriend to whom REYNOSA would sent the photograph of RAMIREZ, so the two could correspond.

RAMIREZ advised he is acquainted with FCI inmate CHINO OLVERA, and he is acquainted with OLVERA because of his photographic duties. He never observed TREJO with OLVERA at FCI.

RAMIREZ stated he is also acquainted with TONY PALACIOS, and he noted that PALACIOS is known as "Big Nose Tony", and PALACIOS is from Leavenworth. RAMIREZ does not know if PALACIOS was acquainted with TREJO. He added that to his knowledge TREJO did not have any debts.

RAMIREZ advised he arrived at FCI in July, 1978, and he is not worried about his personal safety because of his friendship with TREJO because he is not involved with anybody at FCI.

RAMIREZ stated he attends the meetings of the PUMA organization at FCI, but he is not an officer in this group.

Interviewed on 11/14/78 at Lompoc, California

File # Los Angeles 70-10548

by SA THOMAS G. MANSFIELD and SA JAMES R. WILKINS TGM/bef

Date dictated 11/17/78

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/30/78

ROBERT RAMIREZ, Inmate Number 17160-148, was interviewed at the Federal Correctional Institution (FCI), Lompoc, California, where he is currently incarcerated. RAMIREZ was again advised of the identity of the interviewing Agents and that he was being interviewed regarding his knowledge of the fatal stabbing of THOMAS ALBERT TREJO on November 11, 1978.

RAMIREZ advised that he is known in some circles of the inmate population by the nickname of BLACK BOBBY.

RAMIREZ advised that he has known TONY PALACIOS for some time having met him when they were both incarcerated at the U.S. Penitentiary, Leavenworth, Kansas. He denied being involved with or being associated with CHINO OLVERA and in fact advised he does not like OLVERA. He also related that he has known WILLIE GOUVEIA for some time, both inside institutions and from when they were on the street together.

RAMIREZ provided the following information regarding his activities on Saturday, November 11, 1978.

RAMIREZ awoke at approximately 7:00 AM and went to breakfast with three other inmates. These inmates were identified as PELON, who allegedly works in the kitchen; SAL, a young inmate from Santa Monica; and an inmate identified as JESUS. Following breakfast, RAMIREZ went to the recreation yard until it started raining at approximately 11:00 AM. About 11:00 AM, he went to brunch, and after eating he was enroute from the chow hall back to the yard when he saw THOMAS ALBERT TREJO entering the chow hall. He placed this time as approximately 11:30 AM. At that point he asked TREJO to go to the yard to work out with him, and TREJO muttered words to the effect that he had just awakened.

RAMIREZ went back to the recreation yard and walked the track for an unspecified amount of time. The weather again became rainy and he came inside and went to the gymnasium where he watched a basketball game between some Chicano inmates and a group of black inmates. He re-

lated that he kept score for the Chicano team during this game. He continued that he left the basketball game and went back to the unit.

When questioned specifically about certain individuals believed to be involved in the homicide of THOMAS TREJO, RAMIREZ provided the following information.

On the Saturday morning in question, he saw TONY PALACIOS during the early morning hours in the main corridor, however he did not walk the corridor with him. He related this was about the time that he was returning from the recreation yard. He also admitted seeing WILLIE GOUVEIA in the hallway, however, likewise did not associate with him. He continued that he did not associate with CHINO OLVERA and reiterated he did not like CHINO OLVERA. He stated he saw "CHAMP" REYNOSO at breakfast; however, did not associate with him during the day. Regarding PEDRO FLORES, RAMIREZ advised he knows who he is, but does not associate with him. He denied knowing any inmate by the name of RICKEY RESENDEZ.

RAMIREZ was questioned as to his possibly seeing THOMAS TREJO ironing near the front door of "F" Unit during the early morning hours, November 11, 1978, and he stated this was not so. RAMIREZ denied any knowledge on the part of THOMAS TREJO in any Mexican Mafia type activities. He likewise denied being a Mexican Mafia member himself.

RAMIREZ advised that he knows STEVE KINARD in "K" Unit; however, did not see him on Saturday, November 11, 1978, and knows nothing about any possible Mexican Mafia association on the part of KINARD.

RAMIREZ once again advised that he considered himself a very close friend of THOMAS TREJO; however, since he could provide no information in this matter, he made it clear that he wanted to see the killers of THOMAS TREJO "get their own on the yard".

Interviewed on 11/20/78 at Lompoc, California

File# Los Angeles 70-10548

by SA JAMES R. WILKINS and SA ROBERT J. LADD
JRW/bef

Date dictated 11/24/78

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DECLARATION OF WILLIAM KINDIG

I, WILLIAM KINDIG, declare under penalty of perjury:

1. I am a corrections supervisor of the Administrative Detention Unit, (ADU) Federal Correctional Institution, Lompoc, California. I am familiar with the policies and procedures governing the operation of the A.D.U.

2. There is no limitation on the number of telephone calls which may be made by an inmate housed in the A.D.U. Rather, an inmate wishing to make a telephone call needs to notify an A.D.U. staff member of his desire to make a phone call. This staff member then informs the inmate "Parent team", that is the unit to which the inmate was assigned in the general population. This staff member, consistent with his or her schedule and the availability of telephones will make a phone available for the inmates use in the A.D.U.

3. In the instance where an inmate states he wishes to speak with an attorney a special attempt is made to quickly make a telephone available. Such calls are not monitored by prison officials.

4. The foregoing is known to me of my personal knowledge and if called upon to testify I would do so competently.

5. This declaration has been read to me by Assistant United States Attorney Bert H. Deixler and I have authorized him to sign it on my behalf.

EXECUTED: This 2nd day of September, 1980.

/s/ Bert Deixler

BERT H. DEIXLER

Assistant United States Attorney

MICHAEL J. TREMAN
Attorney at Law
8 E. Figueroa, Ste. 230
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(805) 962-6544, 963-3569
Attorney for Defendant
WILLIAM GOUVEIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 80-535-MML

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ADOLPHO REYNOSO, WILLIAM GOUVEIA, ET AL.
DEFENDANTS.

**DECLARATION OF MICHAEL J. TREMAN IN SUPPORT
OF MOTION TO DISMISS THE INDICTMENT AND
APPLICATION FOR AN ORDER PERMITTING THE
LATE FILING OF MOTION**

DATE: September 8, 1980

TIME: 2:00 p.m.

I, MICHAEL J. TREMAN, declare:

That I am an attorney at law duly authorized to practice in the Courts of this State and the U.S. District Court for the Central District of California. I was appointed by the court on July 14, 1980, to represent defendant WILLIAM GOUVEIA in the above entitled proceeding, and am fully familiar with the facts and circumstances in this case.

On July 15, 1980, I made a written request to the Office of the United States Attorney for the material specified in Federal Rules of Criminal Procedure, Rule 16, including copies of documents and tangible objects and reports of examinations and tests. Thereafter, in a motion which was heard on August 18, 1980, I requested information concerning the date on which certain specified items were seized or otherwise came into the possession of law enforcement and

the location that the items were initially seized from or possession otherwise obtained from by law enforcement. I also requested the records with regard to the disciplinary action taken against my client with regard to the death of Mr. Trejo. On the date of the motion the government agreed to supply the aforementioned material which I had requested and the court further ordered information concerning persons housed at Lompoc at or near the time of Mr. Trejo's death to be provided to defense counsel.

A copy of what purports to be a roster of inmates at F.C.I. Lompoc during November of 1978 was received by me on August 22, 1980. On August 23, 1980, I received unit rosters and lists of inmates who came to Lompoc during the week of November 4-11, 1978. The only material concerning Mr. Gouveia's handling by the authorities at Lompoc and the F.B.I. as a result of Mr. Trejo's death was not received until August 29, 1980. A copy of this document, an incident report, which was apparently prepared and delivered on December 13, 1978, is attached hereto as Exhibit "A."

In preparation for the Motion to Dismiss I had obtained and reviewed the material used in a similar motion in another case before the United States District Court for the Central District of California, namely the case of the *United States v. Robert Eugene Mills and Richard Raymond Pierce*, case number CR 80-278-WGP. Due to the fact that my client's recollection of what took place with regard to this handling at Lompoc in November, December and January of 1978-1979, was very hazy, I took copies of the exhibits which were used in the Mills case, together with copies of the exhibits which were being submitted on behalf of other defendants in this case, to my client so that he could review them and hopefully thereby refresh his recollection as to what material he had received and when he might have received it. This process was successful to some degree and he was able to provide me with more accurate information concerning the documents he had received. His current recollection in this regard is contained in the declaration we have now been able to prepare and have submitted for filing in support of the motion to dismiss.

Upon receipt of the information concerning other inmates in the Lumpoc institution, I began to try and locate the six witnesses whose names I had specified in my discovery motion. These witnesses are named in the transcript of Mr. Gouveia's interview with the F.B.I. agents, a copy of which was supplied by the government, and is attached hereto marked as Exhibit "B". The process involved in trying to locate these individuals involves contacting the Locator for the United States Bureau of Prisons and providing them with the name and prison number of the person being sought. This source is able to provide you with information concerning the location of the individual if they are still within the United States Bureau of Prisons system, or the name of the institution from which they were released. Thereafter, you have to call the particular institution and convince them to provide you with access to their records which in some cases show where the person was released to. Using this method we have been able to gain information concerning four of the people we are looking for. Although in only one case have we been able to actually contact the individual and interview him by telephone in order to confirm that he is the correct person. The person we have been able to locate is Mr. Packard and he resides in the Scottsdale, Arizona area. We believe that the inmate known as "Danny" has a last name of Padillo, and is currently located in the Fresno area. Mr. Olavera is reported to have been released from June in 1979, but is apparently back in custody. The information concerning Steve Broughton is that he was either released from Terminal Island in June of 1980, or is still there. We are in the process of confirming his location and identity.

Due to the fact that the government claims Mr. Gouveia was present in "M" unit at the time of Mr. Trejo's death, we have attempted to secure information concerning the location of all of the inmates who were purported to be in "M" Unit in November of 1978. We wish to interview these persons in order to determine if any of them knew him and could testify as to whether or not he was present. The Bureau of Prisons locator refused to provide us this information over the phone due to the number of names involved,

and indicated to us that we had to get the information we desired by way of a written request. This request was made by sending the locator the roster of inmates of FCI Lompoc for "M" Unit which was received on August 22, 1980. This roster is attached hereto as Exhibit "C." In an effort to try and determine if any of the former "M" Unit are still located at Lompoc, on August 28, 1980, we sent the "M" Unit roster as supplied by the government on August 23, 1980, to the institution. A copy of this roster is attached hereto as Exhibit "D." To this date there have been no responses to either of our written requests.

In analyzing the information which have been provided by the government to date in this case, I have discovered several problems which the long delay before bringing this indictment have apparently occasioned. Most of these problems appear to be in the area of identifying and locating witnesses on the one hand, and then trying to get any meaningful information out of them in an interview. For instance, in Mr. Gouveia's statement to the F.B.I. he mentions the name of a Rickey Resendez. A Ricardo Resendez, F.B.I. number 873149R5 is listed on the F.B.I. report from the latent fingerprint section identification division as being one of the persons whose fingerprints were evaluated by the laboratory in connection with Mr. Trejo's death. Mr. Resendez' name does not appear in the "M" Unit roster which is attached hereto as Exhibit "D," and I was unable to find it in any of the other locator and unit rosters which were provided by the government on August 23, 1980. The name Resendez and the number 1696-163 does appear under the unit roster for housing unit "M-A" Exhibit "C" hereto. However, it does appear to have been written in at a different time from the other names on that roster, and in a different handwriting. To this date we have been unable to obtain information concerning Mr. Resendez' current location.

Another example can be seen in the following information. On August 22, 1980, I was advised for the first time that the body of Mr. Trejo was found in cell number A-18 in "M" unit. A review of Exhibit "C" discloses that apparently the name "Macias" is listed in connection with that housing

location. There is also information which reflects that a Macias bearing number 1237 is housed in M Unit, cell B-6. (See Exhibit C.) The name Macias does not appear anywhere on the M Unit roster, Exhibit "D", however my review of all of the material contained in the locator and unit rosters shows a "Macias" bearing number 13674-116 in D Unit and a "Macias" bearing number 14237-168 in "H" Unit. The report of the F.B.I. fingerprint examination reflects that an Amando Macias, F.B.I. number 950199A, has his fingerprints identified on an 8x10½ piece of unlined paper bearing mathematical computations and a white shoebox, both of which the government contends were found at the location where Mr. Trejo's body was found.

It is interesting to note that at this same location the government found a brown paper bag bearing handprinting beginning with the name "Sanchez." This bag also contains two palm prints and which were apparently not correlated with any of the defendants in this case. My review of the locator and unit rosters show a total of five persons with the last name Sanchez, two of whom were in "J" unit, one of them in "H" unit, one of them in "M" unit, and another one in either "A" or "O" unit. There is even a listing for an individual quote "Macias-Sanchez" in "L" unit.

The locator for the Bureau of Prisons has advised us that they cannot identify Mr. Resendez by either name or number. And that Macias bearing number 14237-168 was released from Terminal Island on March 1, 1980. That is the most current information we have concerning either one of those individuals. I must point out to the court, that the information I have been receiving through the locator is in my mind subject to a great deal of questioning as to its accuracy, because their records indicate that Mr. Gouveia was released from the institution at Leavenworth, Kansas, on September 24, 1979. They do not have any information concerning his custody in Marion, or his present location here in Los Angeles.

In my opinion, if counsel had been available to the defense at an earlier date, perhaps in the late part of 1978 or the early part of 1979, we would have been able to locate the majority, if not all, of the witnesses we are seeking, in-

interview them and thereby be in a reasonable position to present evidence on behalf of Mr. Gouveia. In addition to the names of nondefendants I have mentioned, there are other names contained in the F.B.I. laboratory reports, this being individuals whose fingerprints were evaluated in connection with the items found at the scene of the location of Mr. Trejo's body. It seems apparent to me that the government considered these people as potential suspects at some point in time, and I would like to have access to them in order to see if they could provide exculpatory material concerning Mr. Gouveia.

On another but related matter, the government has indicated that the only search which took place in this case occurred in cell A-18 in "M" unit. In view of my prior discovery request, which the government indicated they would comply with, I presume that this means that all of the items sent to the F.B.I. Laboratory for blood and fingerprint analysis were found at that location. Listed in the items which were sent to the F.B.I. Laboratory for blood analysis are two pairs of boots and two pairs of shoes. Mr. Gouveia has indicated to me that when he was finally released from solitary confinement, at Leavenworth, he began to inquire concerning his personal possessions from his cell unit in Lompoc. Custody of all of these items was apparently taken by the officials at Lompoc when he was placed in segregation there on November 11, 1978. Eventually some of this material was returned to him, but in particular he remembers that a pair of shoes which he had purchased was never returned, and a number of photographs were retained in Lompoc and subsequently sent to him care of the warden at Leavenworth. There was apparently an impression of some footwear which was located on a locker door in the Lompoc institution. This impression did correspond in size and design with the sole of one of the pairs of shoes sent to the laboratory for evaluation, but because there were no unique identifying characteristics, definite conclusions could not be reached. It was determined that the two pairs of boots and the other pairs of shoes did not make the impression on the locker door. Thus far I must presume, without knowing, that the shoes involved in all of

these evaluations were not the pair taken from my client, and I further must presume that they belonged to the resident of cell A-18 in "M" unit. That individual would appear to have been, at least at one time, the individual named Macias bearing number 1237. In all of the housing unit information which has been provided me to date, I can find nothing concerning Mr. Trejo.

Due to the amount of work involved in trying to analyze the information which has been given to us to date by the government in support of this motion, the fact that it was necessary to use material submitted by other counsel in both this case and other cases to refresh Mr. Gouveia's recollection, and considering the dates upon which the government material which I mentioned above has been forthcoming, I found that it was simply impossible to put together the necessary evidentiary material which I believe we need to submit in support of this motion.

WHEREFORE it is respectfully requested that the court grant my request to permit late filing of this motion and furthermore that it grant the defendant's motion for dismissal of this action.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of September, 1980, at Santa Barbara, California.

/s/ Michael J. Treman

MICHAEL J. TREMAN
Attorney for Defendant
WILLIAM GOUVEIA

RANGE A

RANGE COUNT _____

TOTAL UNIT COUNT

95

INMATE NUMBER	INMATE NAME	MISC.	CELL NO.	INMATE NUMBER	INMATE NAME	MISC.
	CLERK'S OFFICE		1		CLERK'S OFFICE	
11804	INBROOKS	1/10	2		INBROOKS	
19016	DUNCAN	2	3			
8422	HOYERDAL C ^H	4	4			
36017	COLEMAN	5	5			
36563	PALACIOS	6	6			
14791	UNUIS m ^H	7	7		RESENDEZ 1696-133	
94233	RYES	8	8			
11721	ALANIZ	9	9			
14127	MITCHELL	10	10			
2749	CLAYPOLE	11	11			
19674	CESARE	12	12			
2199	CANO	13	13			
35493	AVILA-MACIAS	14	14			
13927	RICHTE	15	15			
36393	FRANKLIN	16	16			
35305	MARSHALL	17	17			
12237	MITCHELL	18	18			
			19			

(12)

17

M-A

PAGE B

RANGE COUNT _____

TOTAL UNIT COUNT _____

DATE MISC.	INMATE NAME	MISC.	CELL NO.	INMATE NUMBR	INMATE NAME	MISC.
-	CLERK'S OFFICE	-	1	-	CLERK'S OFFICE	-
3296	THROWER	013	2			
14808	BETHEL	013	3			
104	MEY	013	4			
1133	SEVILLE	REC DET	5			
1237	MACIAS		6	A-13	-	
			7			
2941	BUTIC	013	8			
7944	AUGUAR	013	9			
6165	JACKSON	492	10			
20585	ANDERSON	013	11			
8732	PETERSON	013	12			
4262	SALAZAR-MUNOZ	013	13			
7926	THOMAS	013	14			
30087	STRAGER	013	15			
10586	BAUMGARTEN	013	16			
14089	ABDUL-MUHAMMAD	013	17			
14809	WAGNER	013	18			
14807	DAVIS	013	19			

(15)

16

M.C.

GE. C.

RANGE CAPACITY: 19

TOTAL UNIT COUNT, _____

RANGE COUNT:

[illegible]

RANGE COUNT: _____

INMATE NUMBER	INMATE NAME	CELL NUMBER	CUSTODY	ASSIGNMENT	MISC
15308	MEDIA	<u>1</u>	MIN	ORD - M	M
		<u>2</u>			
		<u>3</u>			
19013	GARDNER	<u>4</u>	MED	PAINT SHOP	B
32577	OWENS	<u>5</u>	MIN	F/S	B
		<u>6</u>			
36027	HENDERSON	<u>7</u>	COMM	ORD - M	B
4172	WILSON	<u>8</u>	COMM	CLO MIN	B
		<u>9</u>			
		<u>10</u>			
36649	BEENE	<u>11</u>	COMM	F/S	B
		<u>12</u>			
40072	REGALADO	<u>13</u>	MIN	HYAC / WELL UT	M
1732	VILLALOBOS	<u>14</u>	MED	ORD M	M
2564	NICHASIO	<u>15</u>	COMM	MAINT. - M	M
		<u>16</u>			
12475	MIRANDA	<u>17</u>	MIN	ECS	M
1428	AMPA RO	<u>18</u>	MIN	ECS	M
5136	GUERRERO	<u>19</u>	MIN	ECS	M

10

12

RANGE COUNT: _____

INMATE NUMBER	INMATE NAME	CELL NUMBER	CUSTODY	ASSIGNMENT	MISC.
18512	KLIESEN	1 1	MIN	BUS OFC ORD	W
19249	WATSON	2 2	MIN	LAUNDRY	B
35164	LOTTS	3 3	MED	ISG	W
4895	GONZALES	4 4	MED	MACH SHOP/HAC	M
31556	JULIO - GONZALES	5 5	MED	ORD-M	M
31559	ARAYTO - ARIZA	6 6	MED	ORD M	M
86512	BELCHER	7 7	MIN	SIGN SHOP	W
34714	GONZALES	8 8	CLO	F/S	M
31558	ANDRADE	9 9	MED	ORD-M	M
13843	PHILLIPS	10 10	COMM	ORD	I
04648	MORGAN	11 11		M. UNIT MAINT.	W
31562	PEREZ-MANTELLA	12 12	MED	ORD-M	M
33499	SANCHEZ	13 13	MED	MACH SHOP	M
1943	MARISCAL	14 14	COMM	ORD-M	M
18920	KOSER	15 15	MIN	WELD UT / AD. BLDG. ORD.	W
14170	PARRISH	16 16	MED	REC/WELD UT	W
53451	LUDLOW	17 17	MED	SLR	W
14435	PADILLA	18 18	COMM	UNIT CLERK	W
13682	COWLEY	19 19	MED	REC. DEPT.	W

(16)

/ RF

EXHIBIT C(5)

TOTAL UNIT COUNT: _____

RANGE COUNT: _____

7-6

M UNIT

ANDRADE-RODRIGUEZ	31558-120	M		
ANDRADE	87098-136	M	CLD	H+AC
ANPARO	01428-168	M	CLD	
APAYJO-ARIZO	31559-120	M		H+AC/T
BABIN	18712-148	M	CLD	
BELCHER	86512-132	M		
BEENE	36649-118	M	CLD	
RYERS	02673-156	M	CLD	
CARPENTER	35405-136	M		P/W COMB C
CASTILLO	51795-146	M	CLD	
CHASE	17508-148	M		
CLARK	19652-148	M	CLD	
CLEMONS	33929-136	M		MAI
CONSTANTINIS	35070-136	M		
COADREY	13682-116	M		NECC
DUBOIS	19325-148	M		RFC
ELKINS	14739-116	M		
GARDNER	19013-148	M		
GONZALES	04095-156	M	CLD	OF
GONZALEZ-JULIO	31556-120	M		
GONZALES	34714-136	M		
GUERRERO	05136-136	M	CLD	EC
GURNARD	19920-148	M		CAF-SC
HENDERSON	35027-136	M		CRF
HOUSTON	14012-116	M	CLD	ORD-PL
HUBBARD	14086-148	M	CLD	ED DE
HUBBARD	54114-146	M		UNAS
JONES	14183-116	M		SIE
KLEISEN	13512-148	M	CLD	BUS
KOSER	18920-148	M	CLD	FRONT L
LAGUNAS	14179-116	M	CLD	
LAINE	18740-148	M		M
LOTT	35164-136	M		
LOPEZ-DARDEA	47514-146	M		F
LUCLOH	53151-146	M		CEFA
MADDOX	14796-116	M		CONG
MARTAN	05532-156	M	CLD	
MENDOZA	08555-158	M		MAI
MEUTZ-HERNANDEZ	15303-168	M		
HICKLEVITZ	31213-120	M		REC
MIRANDA	12475-168	M		
MORENO	04048-116	M		UNIT
MICASIO	02567-156	M		
MORTIZ	99361-131	M		
MUEIS	32577-136	M	CLD	F
PADILLA	14931-116	M	CLD	UNIT
BARGELINNI	14002-116	M		
PARRISH	14170-116	M	CLD	REC D/P
PERRY	19731-148	M	CLD	ELCC
PERRY	65957-132	M	CLD	IND
PEREZ-MARTELO	31562-120	M		EXHIBIT, D(1)
PHILLIPS	13043-116	M	CLD	CI

GALADO	15432-116	M	REC/ORD
ROBERTSON	40072-115	M	PLANN
RODRIGUEZ	14790-116	M	CCS ORD
SAVILLE	04133-156	M	REC
SANCHEZ	33499-136	M	MACH SH
SUTPHIN	26163-145	M	CARA SH
THOMAS	05317-168	M	HOLD
THOMAS	35710-136	M	
TREVALION	00780-192	M	ORD M
TORRIS	04715-168	M	REC
VASQUEZ	08734-289	M	MIN
VIGIL	06528-156	M	PAID
VILLALONOS	01732-169	M	ORD
WILSON	04172-168	M	CLO M
WEISBERG	14575-116	M	REC DEF
WATSON	19249-101	M	LADY

M-UNIT ↑ CON'T.

A AND O

ANDERSON	20535-148
ANTHONY	19199-148
AUGAR	99944-131
BETHEL	14800-116
BUSIC	03941-131
BAUMGARTEN	20586-148
CASTILLO	24957-136
CLABAUGH	10410-140
CADDO	03134-156
DEICAN	40100-115
DAVIS	14007-116
FLORES	19600-148
GAINES	36355-136
HADPH	14421-116
HEIL	34704-136
HOYERDAHL	00422-166
ISRELL	21060-168
JACKSON	16165-140
JEFFERSON	19450-148
LOCKLEAR	35711-136
MCARD	15786-148
MEY	00104-131
MURIEZ	16764-148
PETERSON	18723-148
POTTER	19641-148
ROBERTS	31183-136
ROGGE	36532-136
RYAN	14100-116
SAUCHEZ	01622-160
STRAGER	30057-117
SALAZAR	24262-149
THOMAS	99920-131
THOMAS	03205-158
WICKER	14000-116

EXHIBIT D6

**EXCERPT OF TRANSCRIPT OF HEARING
ON MOTION TO DISMISS INDICTMENT**

September 8, 1980

[20] MR. LEVINE: Now, there are just a couple of other facts I wish to bring to the Court's attention. I've attempted in the moving papers and in the affidavits that were filed with them to show you some of the problems that we're now encountering with the fact that we only know some witnesses by nicknames. Other witnesses are difficult to find because they're spread in various institutions. Two of the witnesses, as we showed in the affidavit, are now no longer among the living; those being Mr. Lowe and Mr. Thompson. I've further been advised last week that yet another witness, who was on our list of alibi witnesses that I submitted to the government [21] I believe about ten days ago, a Mr. Carillo, is also dead. According to his probation officer or parole officer, he died in April of 1979, after his release from custody.

With respect to several of the other witnesses whom I have listed on the notice-of-alibi list, of which there are about seven to ten names, I have still not located three of the people despite the rigorous efforts of the Bureau of Prisons and the inmate locator in Washington, D.C., and I have letters out to the last known halfway house that each of those people were at to try to locate their current residence, so that I can have them subpoenaed for the trial.

Now, with respect to all of these witnesses, I have to admit to the Court, I've not interviewed them. I don't know to what extent they can actually say Mr. Segura was somewhere else at the exact time of the murder. However, in interviewing Mr. Segura and talking to other people who are involved in this case, we submitted that list of names on our alibi list because we believe that once those witnesses are contacted, they will remember that they were with Mr. Segura at various times during that day, and perhaps if we have the opportunity to interview them at length, we can actually pinpoint the exact hour and time of that day that they were with him in a location other than the cell of inmate Trejo, and that's where he died. These are difficult things that I'm not the only lawyer facing in this case. I'm

[22] sure the Court can appreciate that with a span of two years and the manner in which people's names are remembered and the manner in which they get shifted around the prison system, that all of the lawyers in this case are facing similar problems. I could only depict in my affidavit the ones that I'm facing. I think that they're substantial. I think that they were caused by the delay in this case, which is very, very lengthy.

* * *

[23] THE COURT: Let me see if we can clarify the facts. The murder in this case occurred on what date?

MR. LEVINE: November 11, 1978.

THE COURT: And it may be in your affidavit, but when, if at all, was your client informed that he was at least under suspicion for the commission of that offense?

MR. LEVINE: I believe he was first put in the isolation unit on December the 4th. That's stated in his declaration, submitted as part of the motion. So that was, say, three weeks after the alleged commission of the crime.

THE COURT: All right. But was there any indication to him, such as some administrator in the prison facility making an accusation or anything at all that you're aware of, which would have put him on notice that he was at least a suspect in this case?

MR. LEVINE: At that stage, that's correct. That's in his declaration.

THE COURT: Well, prior to December the 4th.

MR. LEVINE: No.

THE COURT: So prior to December the 4th, there was no objective activity which would put a reasonable man [24] on notice that he was under suspicion for this offense?

MR. LEVINE: I'm not sure. He may have been interviewed by the FBI during that period. I don't recall the date under which he was interviewed. But I'm not sure whether that would rise to the level to put him on notice that he was going to be charged with the offense. But in any event, the first real knowledge or suspicion that he would have had as a reasonable man to that effect would have been his isolation in the I Unit at Lompoc.

THE COURT: Now, is the Mills case factually different in any way than our case in terms of the time at which the defendant was put into isolation?

MR. LEVINE: I can't speak to that. Only the length of the delay, to my knowledge, makes it different.

THE COURT: My reading of the order dismissing the indictment in *United States v. Robert Eugene Mills* leads me to believe that within hours after the murder, which was on August the 22nd, 1979, the two defendants had been placed in administrative detention, as opposed to, in our case, a three-week hiatus. That may or may not be significant, but I do seem to see that distinction.

MR. LEVINE: As I recall, that was a distinction, your honor. I don't think it has any significance. I think the significant factor is the request for a lawyer, the inability to have that kind of assistance, and here the [25] enormity of the delay. I don't think, in view of the prison documents showing that the investigation had reached a conclusion on December 13th of 1978, that the further shoring up of the government's case through the next twenty months, as depicted in the Wilkins and Deixler affidavits in opposition to the motion, is very relevant, in view of the prison's own internal document, which was evidently substantial enough to put the defendant into an isolation unit for a period of—an endless period at that point. it lasted approximately twenty months.

THE COURT: Let's discuss the standard that the Court should apply. I'm reading from *Arnold v. McCarthy*, a Ninth Circuit case, 566 F.2d 1377, which reads as follows: "The due-process test for impermissible preaccusation delay requires a delicate balance of circumstances of each case." Citation to *United States v. Marion, Lavasco, and Mays*. "Primarily, we must compare the gravity of the actual prejudice shown to the reasons for the delay." Then citation to *Lavasco*.

Do you agree, Mr. Levine, that that is the standard that the Court should apply?

MR. LEVINE: Yes.

THE COURT: All right. Let's talk about it, then. The one sentence seems to sum it up: "Primarily, we must com-

pare the gravity of the actual prejudice shown to the [26] reasons for the delay." What, in your view, is the actual prejudice that you have factually demonstrated here?

MR. LEVINE: I think basically there are two. One involves the loss of witnesses. Obviously, the death of a potential witness is fairly apparent. But when you couple that with the fact that even though there are six or seven other potential alibi witnesses that we've listed, with not having been able to interview those people, we don't know, with the passage of time and also with other factors contributing, to what degree they would be valuable witnesses, and we only know that Mr. Lowe, Mr. Thompson, and Mr. Carillo, who are also on the list and also whom we didn't interview, were also potential witnesses. So that here's a defendant twenty months later, or now almost two years later, who barely remembers the names of witnesses and comes up with several of the names, and a good percentage of them are dead or can't be found. That's a prejudice I think the Court can consider. We're not just dealing with dim memories here, although that's certainly a problem.

THE COURT: Well, let me read on, and then let's apply this law to what has been demonstrated thus far. I'm reading on in *Arnold v. McCarthy*.

"Proof of actual prejudice due to loss of a witness must be 'definite and not speculative.'" Citation to *United States v. Mays*. "The assertion that a missing witness might [27] have been useful does not show the 'actual prejudice' required by *Marion*." and again *United States v. Mays*, quoting *United States v. Galardi*, a 1973 Ninth Circuit case.

Now, what demonstration has there been that we should discuss or that the Court may consider as to the actual prejudice? Apparently, again, as this case states, the loss of a witness may or may not demonstrate actual prejudice, and as to the dead witnesses, for example, don't we have to go further than saying a potential witness has died? Let me ask you rhetorically, does the death of a potential witness per se result in actual prejudice, or must the defendant, the moving party, go somewhat further than that?

MR. LEVINE: I think if he were relying only on the fact that a potential witness had died, I think we would have to go further. I think he'd have to have some further indication as to what that witness would testify to, and he'd have to show in that indication that the testimony would be exculpatory or likely to lead to an acquittal. But here we're not moving for a dismissal only because three people died. I think we're using that fact as a further example of the difficulties this individual now faces two years later in investigating this case and preparing himself for the charges that the government is going to bring.

Now, remember, the government doesn't have these [28] difficulties, because at the time that they run into a witness, shortly after the commission of the offense, they get a statement while it's fresh in the witness's mind and they work their case up, as they've indicated in their declarations they did in this instance. Of course, it took them twenty months to do it here. But nevertheless, they don't have the difficulty that Philip Segura has. He sits here now facing probably the most serious of charges that can be levied against an individual, and the best he can come up with, if the Court wants to look at the alibi list, are nicknames of people, because he only lived in Lompoc for a period of three weeks before he allegedly committed the murder. And the difficulties that he's facing right now, twenty months later, are insurmountable. And why are they insurmountable? One, because he wasn't given a lawyer when he requested it, and two, because he was kept out of the prison population, with the inability to talk to these people, for a period of slightly less than two years, during which time the government is proceeding with what they say is due diligence to put their little package together, and it's because of that delay that he's faced with the situation he's faced with now. He didn't create it. I don't think this situation, your Honor, differs from the Mills case, with the exception of the delay, which makes it even more difficult for the Court to deny this motion.

[29] THE COURT: All right. Have you completed your thoughts in this matter, Mr. Levine?

MR. LEVINE: I think I have. Thank you.

* * *

* * *

[74] MR. WALSH: Your Honor, I'm Joseph Walsh, moving to dismiss the indictment on behalf of Robert Ramirez. And we're alleging three separate legal grounds. First, the [75] denial of the right to speedy trial under the Sixth Amendment, the denial of the right to due process and speedy trial as guaranteed by the Fifth Amendment, and a denial of a right to counsel.

The critical facts that are different in my client's case from the remaining defendants are that between November 11, 1978, and December 4, 1978, my client was not a suspect in the murder during that three-week period, and it was only until December 4th, when he was interviewed by the FBI—and I've attached the FBI report as the first exhibit to my moving papers—that he was informed by the FBI that he was a primary suspect in the murder of Thomas Trejo, and from that date on he was placed in solitary confinement and removed from the general inmate population and not allowed to mingle or associate with other inmates within the institution in order to do whatever investigation he wanted to do in order to locate possible witnesses.

Significantly, in the FBI report of the December 4th interview, the one that occurred three weeks after the murder, after which time Mr. Ramirez was placed in solitary confinement, it was on that date that he had requested a lawyer, and that appears in the last page of the FBI report, and I've underlined that portion, where during the conversation he did in fact request a lawyer.

* * *

[77] And the reason tht he was placed in solitary confinement I think is adequately demonstrated by the supplemental Exhibit A which I filed, which is the incident report of the Bureau of Prisons. And as of that date, which was December 13, 1978, the description of the incident which caused the Bureau of Prisons to hold the hearing was that based on confidential information and inmate interviews; Robert Ramirez was in fact being charged with the fatal stabbing of Thomas Trejo. And it states that that's the reason [78] he was placed in solitary confinement on December

4th. So I think it's clear that the activity of the prison in placing him in solitary confinement was precisely related to the stabbing incident.

Another significant factor in the incident report, on the second page, the last paragraph indicates that the prison's investigation—or it states below that “Inmate Ramirez was placed in I Unit on December 4, 1978, pending investigation by both the FBI and the investigative supervisor. Investigation completed that date”—and then, in parentheses, “13 December 1978”—“and now referred to the unit team for disposition.” So at least this one disciplinary unit had completed their investigation of the murder as of December 13, 1978, and apparently had come to the conclusion that my client, Mr. Robert Ramirez, was a prime suspect as of that date, which is approximately one month after the stabbing.

If I can relate now what evidence I am offering to the Court as proof of prejudice to my client because of the long delay, I have filed a notice of alibi, and also, in connection with the motion to dismiss, my client has filed a declaration, and in that declaration he has indicated that one of his alibi witnesses is dead and that four of them he knows only by nicknames, and that three of his alibi witnesses have been since released from custody, and at the present time the whereabouts of those inmates are not known. [79] Since the time I have employed an investigator, and we're currently conducting what investigation we can now to work back to the point in time when they were released from prison to locate those witnesses. But as of the present time, we have not located the whereabouts of those three inmates.

The offer of proof is that all of those witnesses—specifically, the four persons known only by nicknames—were persons that my client saw and spoke with in the gymnasium around the time of the killing, as listed in the notice of alibi, and also, the three witnesses whose present whereabouts are not known but whose names are known, Arturo Garay, Jose Mahia, and David Jaramillo, those are three witnesses that my client saw and spoke with in the gymnasium at or about the time of the stabbing, and Alberto Rosas, the one deceased witness listed in the notice of alibi, is one person that my client saw and spoke with in

the gymnasium at or about the time of the stabbing, as set forth in the notice of alibi that has been filed with the court.

* * *

[85] THE COURT: I'm trying to establish whether or not it's your position, for example, that Mr. Ramirez was in some way held incommunicado for twenty months.

MR. WALSH: No. He was completely segregated from the entire inmate population.

THE COURT: I understand that from his affidavit.

MR. WALSH: But he did have family visits. Some were allowed him; a limited number per month, less than granted prisoners in the normal prison population. And I believe he did have some limited telephone rights, which were [86] severely limited from those prisoners in the general inmate population. So he wasn't held in complete incommunicado, but he was not in a position to hire private counsel.

* * *

[93] MR. ARAUJO: These are the records that— specifically, the incident report that is drafted by the Bureau of Prisons. I believe there might be a document relating to the decision of the Bureau of Prisons with regards to the incident, disciplinary hearing, and—

THE COURT: Excuse me for interrupting, Mr. Araujo, but are these comparable, or at least generally comparable, to some of the affidavits I've seen or exhibits I've seen submitted?

MR. ARAUJO: Well, they are generally comparable, your Honor, but specifically, what the specific details on those documents will be, I don't know, since I haven't seen them.

THE COURT: I understand. Let me interrupt—

MR. ARAUJO: They're comparable, yes.

THE COURT: All right. Let me interrupt and ask the government. Did the government agree to submit to Mr. Araujo these disciplinary documents?

MR. DEIXLER: Yes, your Honor, we did. Unfortunately, the documents I believe are held in Mr. Reynoso's file, which is in Illinois. We requested them immediately by telex the morning after the hearing. We still haven't received the documents. The government would certainly be prepared to enter into some stipulation, so that the Court

could rule on [94] the motion to dismiss. I'm confident that what is contained in the other incident reports would be contained in Mr. Reynoso's report. The government is willing to stipulate that he asked for an attorney and the government is prepared to state that no attorney was provided for him in connection with the IDC hearing and that he received a notice of discipline as a result of that hearing. I'm not sure what beyond that Mr. Araujo wishes to elicit.

MR. ARAUJO: Well, I would like him to stipulate that the records would indicate that the Bureau of Prisons was informed by the FBI that their investigation was complete as of December the 13th, 1978. That is the additional stipulation. And that he was being held in segregated confinement not merely for the purpose of the discipline as a result of the administrative hearing, but also being held pending the investigation by the FBI of criminal charges. If he's willing to stipulate to those two facts, then I would be willing to stipulate as to what the content of the records are.

MR. DEIXLER: Well, your Honor, I'm willing to stipulate to the exact language as contained on Mr. Ramirez—

THE COURT: Well, perhaps you can show it to Mr. Araujo, and it may be agreeable with him.

MR. DEIXLER: Yes.

(Brief pause.)

[95] MR. ARAUJO: Well, your Honor, I would be willing to stipulate to the effect that inmate Reynoso was placed in I Unit on December the 4th, 1978, pending investigation by both the FBI and the investigative supervisor. With regards to when the FBI completed the report, I believe there is—with regards to Mr. Levine's client, his records indicate that the FBI completed their investigation on December the 13th, 1978.

MR. DEIXLER: If Mr. Araujo can show me the document that says that. The fact of the matter is that the FBI didn't complete their report until August of 1980, when we finally got the last bit of investigation back.

THE COURT: Well, I take it, then, you're not willing to stipulate that the FBI investigation was completed on December the 13th, 1978, or are you?

MR. DEIXLER: I'd be willing to stipulate to it in the context in which it was used in connection with somebody else's IDC report. If it's used—

THE COURT: Well, if there's some ambiguity, let's not stipulate to another ambiguity. It won't assist the Court of Appeal or this Court either.

MR. DEIXLER: That's what I'm concerned with. If they can narrow it down when they say the investigation is complete, what it is that Mr. Araujo means by that, I think we can work out a stipulation right here. If Mr. Araujo wants [96] me to stipulate to the fact that the entire investigation ever conducted by the Federal Bureau of Investigation in connection with the Trejo murder was completed on December 13th, I can't stipulate to that, because that's just not true.

MR. ARAUJO: Your Honor, the language I'm specifically referring to is—I believe it's Exhibit 1 of Mr. Joel Levine's motion on behalf of Mr. Segura, which states on line 14, I believe, of page 2, "On December 13, 1978, the FBI completed their investigation of this incident and did release the report back to the institution for their investigation and disposition this date."

MR. DEIXLER: The government will stipulate to that in the context in which it's used, your Honor.

MR. ARAUJO: I'm willing to stipulate to that.

THE COURT: All right. The Court accepts the stipulation. What does it mean, gentlemen, before we go much further? Let's not leave it. Apparently each of you has a different interpretation of the meaning of that particular phrase. Is it your position, Mr. Araujo, that at that juncture they could have indicted within a few days thereafter, because their investigation was complete?

MR. ARAUJO: It's my position that they could have investigated within a reasonably short period of time after that, even giving the government a sufficient amount of time to receive scientific reports for the purpose of trying to [97] establish additional scientific evidence that ties the defendants, the accused in these cases, to the crime.

With that in mind, I'd like to deal with the issue, since I think the Court has heard basically the legal arguments, but to deal with the issue of the government's reasoning for their delay. It is clear from the declaration of the FBI agent involved in this case, who I believe is Agent Wilkins, that it was as early as November the 29th, 1978, when they had established through an interview of an inmate, unnamed in

the declaration, that my client, Mr. Reynoso, was apparently involved in the killing of Thomas Trejo. Nowhere else in that declaration do they indicate that either additional witnesses were discovered or that they had information that there might be additional witnesses available to establish the guilt of Mr. Reynoso. So far as we know, their case, from the standpoint of witness interview, is substantially completed sometime during the month of January, perhaps, of 1978. It appears that at that point, on November the 29th, 1978—

THE COURT: You said January, '78.

MR. ARAUJO: I'm sorry. On November the 29th, 1978, that the FBI felt that it had sufficient evidence, certainly with regards to witnesses, to tie Mr. Reynoso to the murder.

* * *

[114] MR. TREMAN: Your Honor, the material which the government has just handed me begins with the period of time dated December 29, 1978. The documentation which I had referred to from Mr. Flores' motion would I believe begin with that period of time in November of 1978, when my client was initially put into solitary confinement at Lompoc; namely, on the 11th of November. He has reviewed those documents and advises me that basically—I'm now referring to A and B on Mr. Flores' motion—he received documents [115] similar to those two, although, obviously, they would not be exactly the same. But I do wish to make reference to them for the following purposes: I think that the November 11, 1978, Exhibit A, what I speculate to be the same for my client, because the subsequent material we have received reflects that he was on that same date put into administrative detention for the reason of an investigation on trial of crimes committed in the institution. That is significant, I think I can show later, in that since the entire time of his being placed in solitary confinement, he was treated as a suspect in a criminal matter, and I believe that he may be the only one of the defendants who at the time of his investigation and interrogation by the FBI was advised of constitutional rights, and indicated in that procedure, I submit to the Court, that at least the FBI considered him to be a suspect in a criminal case and intended

to treat him that way, as opposed to any disciplinary action which may be being considered in the institution.

Furthermore, the response, which is reflected on Exhibit B, I believe provides some information which goes to a couple of the questions which your Honor has asked earlier; one of those being in connection with when did the arrest occur if it occurred, as we contend that it had. I would point out, in reviewing the response on Exhibit B and working on my assumption that there was a similar response [116] from my client, that the administrative-detention policy of the institution reflects, as stated there, that an inmate may be placed in administrative detention pending investigation or trial for a criminal act. And you'll note there's no reference there to his being placed in that status within the institution for a disciplinary action. And then they go on to state that "Due to the seriousness of the offense for which you are under investigation"—again using the same words they used in the prior sentence—"it was not possible to complete this investigation under the normal 24-hour period." I believe that the rules which apply to the disciplinary-action approach which has been argued, I think, by the government in its papers and considered by the Court, if this was not an arrest, then the processing of that administrative action with regard to my client would have taken place within roughly a 24-hour period after his initial placement in detention on November 11.

Reading that entire memo, there is an indication that—I think, in reflecting what happened with my client, that the matter was actually subject to the control of the FBI, and in his case, he was not released back into the general population; rather, he was interrogated by the FBI on—my recollection is December 4, thereafter remained in administrative detention or solitary confinement, and subsequently stayed in that status until he was transferred to [117] a number of other institutions, and remained in that status all through the long period of transfer, which are reflected in his declaration with the dates as best he can recall them. He did not have any opportunity to preserve witnesses on his behalf beginning from day one thereafter, because he was isolated from the main prison population.

He has indicated in his declaration that he did request counsel at least in connection with the administrative pro-

ceedings, and the documents that the government has submitted to me today confirm those requests and that the responses discuss the fact that he made that request and whether or not he was entitled to it.

* * *

[119] With regard to those witnesses in his particular case, as I have indicated to the Court in my declaration, I did request from Lompoc information concerning the people who were in M Unit based on the roster supplied by the government. At the time of my declaration, they had not responded. They did respond, received by my office on September 5th, and they have indicated that of the people on the M Unit roster, 62 of those people are no longer in the Lompoc institution and that five of the people still are. The significance of that is that in my client's case, he was not able to talk to any of the people in the M Unit up until the period of time of my appointment to represent him in order to ascertain if they could provide information on his behalf. Certainly that has hampered us now that those people have been transferred wherever the 62 people may have gone, and we will have to go back and consider reconstructing that. Clearly, if counsel had been appointed within thirty days of what I submit is the date of arrest, I could have gotten to a [120] substantial number of people on this list with a minimal amount of difficulty.

Furthermore, in order for me to go to the institution at this juncture, what they are requiring is that we submit a written list indicating why I want to go, who I want to see, and then the institution evidently will consider making arrangements for me to do that, although I have been informed that other counsel have in fact been turned away from institutions in connection with trying to conduct their investigations in this case. Whether or not I'm going to meet that problem at Lompoc I don't know. We began asking them about these people within a day or two after my receipt of their names, and it's taken them this length of time to even tell me who's up there for me to look at. Specifically, my client had provided particular names to the FBI who up until my appointment he has never had an opportunity to have them even interviewed by someone on his behalf. And of the people that are listed there, I have been able to contact, locate, and talk to one of them, who's no long in the state, Mr. Packard. Mr. Packard has advised me

that he has some recollection about that date, but he does not specifically, at least in my conversations with him, recall times when he saw my client. Packard will be the one person in the institution who was closest to my client, in that he was housed I think immediately across [121] the hallway from him, and therefore knew him on a closer basis than some of the other inmates.

We have locations on a couple of the other inmates, and in at least two situations, the only information we have is where they were released to. But I've not even been able to confirm that those are the individuals whose nicknames my client gave to the FBI at that time. At a minimum, the FBI could have checked out the nicknames at that point and let us know who the particular individual is, but they evidently chose not to do that.

Two other people, Mr. Recendez, whose name I have discussed in my declaration to the Court and who would appear to be at least a theoretical percipient witness to the murder, in that he was housed in the M Unit very close to where Mr. Trejo's body was discovered, the institution can provide us no records with regard to him or even confirm that he was in existence, yet the FBI sent somebody's fingerprints to be examined with a name similar to that and with an identification number.

And finally, a gentleman by the name of Macias, who, the records we have been provided show, was in the cell, was supposed to be housed in the cell where Mr. Trejo's body was found, has been released, and we've been unable to locate him with regard to where he was released to or where his present whereabouts are.

[122] My client, as you can see from the material he provided to the FBI, was also in the gymnasium roughly during the period of time involved in a basketball game, but at this point in time he did not know people well enough to be able to tell me the name or even the nickname of some of the people that he saw. Presumably, he saw the same people that other counsel's clients knew better and could reflect their names on, but in some cases, those people are now deceased. So whether or not they would have provided information helpful to us I can't say at this point. I could have said had counsel been appointed back in 1978 or 1979.

Finally, as far as the question of scientific investigation is concerned, it would be correct that they did conduct some additional scientific investigation with regard to my client,

but the report on that investigation was completed and returned to the government by May 4, 1979, and as far as I can tell, there has been no further investigation of anything concerning my client, both his fingerprints or any other physical characteristics, because the government had them all in their possession prior to May of '79 and apparently submitted them to the FBI for examination. It appears that they were completed with regard to my client by May 4 of 1979, and ever since that period of time, I think they could have gone forward with an indictment against him if they had chosen to do so. I cannot see anything in the [123] material Mr. Deixler has submitted to reflect why they waited with regard to my client.

And I'll submit it with regard to that, your Honor.

* * *

[137] THE COURT: Well, the Court would indicate initially that it is unfortunate that there has been the delay that has ensued in this prosecution. I do not, however, find the delay was motivated by any intent to gain a tactical advantage over the defendants, any motivation by the government, and I find no bad faith on the part of the government. It's apparent from the Court's examination of what has occurred that there were a large number of witnesses to be interviewed, and certainly a correctional setting can complicate in many ways such an investigation.

I believe, insofar as a showing of actual prejudice, there has been an insufficient showing of actual prejudice to the defendants by the passage of time. There apparently are many potential witnesses to these events and many witnesses who will be proffered by the defense in this matter. It just seems to the Court that there has been an insufficient showing of actual prejudice of the extent and nature necessary to justify a dismissal of a murder charge.

The Court does not find that there has been a de facto arrest in this matter occurring at the time of the disciplinary procedures. The court must distinguish between administrative procedures and indictment and the respective [138] rights that are appendant to each of these proceedings. Therefore, the Court finds that at the time of the disciplinary proceedings, the right to counsel did not adhere or did not arise, and did not arise until the appropriate time after

the indictment. And of course, after the indictment, there is no pending claim of any denial of rights, such as the right of representation by counsel. The defendants in this case were not held incommunicado. The Court would observe they did have rights, albeit substantially more limited rights, than if they were in the general prison population, but they did have the rights to visitation of either family members or others and the right to telephone, write, and the right to file complaints and petitions.

At any rate, the motions to dismiss the indictment or, in the alternative, to exclude evidence in this matter are denied.

* * *

**EXCERPTS OF FIRST TRIAL IN
UNITED STATES v. GOUVEIA, et al.**

**LOS ANGELES, CALIFORNIA,
WEDNESDAY, SEPTEMBER 24, 1980**

* * *

ANTONIO PALACIOS, called as a witness by defendant Gouveia, being first duly sworn, was examined and testified as follows:

THE COURT: Please state your full name and spell your last name.

THE WITNESS: Antonio Jaime Palacios, P-a-l-a-c-i-o-s.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. TREMAN:

* * *

[6] Q. Approximately how long were you on "I" Unit, in other words, residing on "I" Unit before that meeting took place?

[7] A I'm not entirely sure. Might have been a day or so or a couple of days. Maybe five days. I'm not sure how many days I was there before I—he was there. I'm not

sure at all. He might have been there the same day. I'm not sure.

Q All right. Now, with reference to the day that you were locked down and went into segregation, into I Unit, beginning in the morning, what is the first activity that you can recall that you engaged in?

A Well, I got up kind of late that morning. I guess it was about 8:30. I'm not sure about the time, because at that institution they don't call out the time, and I was used to—see, every hour on the hour in McNeil Island they call out, "Lock up," you know, and you know what time it is, or, you know, they tell you, "The yard is open," or—see, and over here at Lompoc, they didn't do that. So I just got up in the morning. I didn't know exactly what time it was. I imagine it was about 8:30.

Q What did you do after you got out?

A I went out to the yard and ran the track for about forty-five minutes. I figured I ran about three or four miles.

* * *

[11] Q Now, did you have the occasion to see Mr. Gouveia on the day that you were locked down?

A I believe so, yes.

Q What is your best recollection as to where you saw him and what, if anything, he was doing?

A I seen him in the hallway as I was milling around after brunch. I believe I seen him out on the yard—I couldn't be positive, but I think I seen him on the yard while I was walking around. And I think I seen him in the gym after everyone had come in, because it was raining out.

MR. TREMAN: I have no further questions, your Honor.

[14] *CROSS EXAMINATION*

BY MR. DEIXLER:

Q Where did you see Mr. Trejo on November 11th?

A In the corridor.

Q And about what time of day was that, sir?

A I don't know. Sometime after I came in from the yard.

Q What time did you come in from the yard?

A I couldn't say what time that was. I don't know what time it was.

Q Was it about 8:00 o'clock in the morning?

A Oh, no, no. It was after brunch.

Q That would have been sometime, then, between the hours of 11:00 and 12:00?

A Possibly, yes.

Q You testified previously that you saw Mr. Gouveia near the gym; is that correct, sir?

[15] A Did I testify to that?

Q Well, let me ask you the question—

A Well, I seen him in the dining hall, the show area, where you go to the show, the hallway from the yard into the—it's all right there right next to each other. It's not a—it's not very far from each other. They're all right there, you know, the main—

Q You saw him in one of the corridors?

A In the main corridor. There's only one corridor, see.

Q I see. About what time did you see Mr. Gouveia?

A Right around the same time, yes.

Q About the same time you had seen Mr. Trejo?

A I seen Gouveia and also—in the corridor, yes.

Q Did you see him about the same time that you saw Mr. Trejo in the corridor?

A No, I don't think so.

Q About what time did you—

A I think I seen Gouveia after brunch. I seen the other—Tommy, I seen him when I came in from the yard, because I remember that distinctly, because he stopped me and he said that he was going to—he was supposed to get a visit, and something about that his next-door neighbor—his wife was going to fix me up with his next-door neighbor.

[16] Maybe I could get a visit or something. And that was the extent of the conversation.

Q What time did that—

A He was in—I don't know what he was doing. He was on his way to—I don't know what he was doing.

Q What time did that conversation take place with Mr. Trejo?

A I don't know.

Q Well, was it in the morning?

A It was in the afternoon, after brunch, after we came in from the yard.

Q After brunch, when you came in from the yard?

A Yeah.

Q Okay. What time, approximately, did you go to brunch?

A Like I say, I don't know what time brunch—at what time it was. I don't know the time. I just played it by ear. When my unit went to eat, I went to eat. I imagine it was around 10:30 or something like that.

Q And how much later after you saw Mr. Trejo did you then see Mr. Gouveia?

A I seen this Gouveia after I came out from brunch, and possibly I think I seen him on the yard also. I'm not really sure. It's been a long time, you know.

[17] **Q** So you're not really sure when you saw Mr. Gouveia; is that correct?

A I know I seen him in the—in the corridor. There's no doubt about that.

Q Does that corridor connect with the gym?

A Well, it—there's a corridor that—that's off—there's a hallway that's off the corridor that goes out to the yard, and off of that corridor is the gym.

Q Who was with Mr. Gouveia when you saw him in that corridor near the gym?

* * *

A He might have been with somebody, but I never—I didn't pay no attention to it.

Q You don't recall who he was with?

A No.

Q Did you know that Mr. Gouveia was a friend of Mr. Reynoso?

MR. TREMAN: Objection, your Honor

MR. ARAUJO: Assumes facts not in evidence.

MR. TREMAN: It's also beyond the scope.

[18] **THE COURT:** The objection is sustained.

BY MR. DEIXLER:

Q When you saw Mr. Gouveia in the gym corridor, did you have a conversation with him?

A Yeah. "Hey, what's happening, Willie? Where are you going?"

Q Do you remember those words distinctly?

A That's what I say to everybody.

Q Did Mr. Gouveia tell you where he was going?

A No. He just—I imagine he was just cruising around. I just went the other way.

Q When was the next time on that date that you saw Mr. Gouveia?

A I think I seen him on the yard—I'm not sure—walking around the track. There's quite a few peoples walking around the yard.

Q About what time did you see Mr. Gouveia?

A That was after—sometime after brunch.

Q Well, you saw him the gym corridor after brunch; is that correct?

A Well, you see, after brunch is—what I mean is, "after brunch" is in between the time after brunch to the time when it started raining outside.

* * *

[19] Q Who else was in the gym with Mr. Gouveia when you saw him there?

* * *

BY THE WITNESS:

A Well, I don't know exactly—

MR. TREMAN: Objection.

THE COURT: Overruled.

MR. LEVINE: Assumes a fact not in evidence.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A Well, I don't know exactly who he was with. There was a lot of people in there, and a lot of people that I know were there and a lot of people that he knows were in there, I imagine. I don't know who exactly he was with, you know. I was just playing pool. I'm not asking him, "Hey, are you with him or are you with him?" You know, I wasn't into that. I just—

Q Would it be fair to say that when you saw Mr. Gouveia in the gym, he was with a group of inmates?

A Well, there was a pretty big group. There was a lot of people playing pool, people playing shuffleboard. Yeah, I imagine there was a lot of people in there, yeah.

* * *

[3] LOS ANGELES, CALIFORNIA, THURSDAY,
SEPTEMBER 25, 1980

* * *

RAYMOND OLVERA, called as a witness by defendant Gouveia, being first duly sworn, was examined and testified as follows:

THE CLERK: Please state your full name and spell your last name.

THE WITNESS: Raymond Olvera, O-l-v-e-r-a.

THE CLERK: Thank you, sir.

DIRECT EXAMINATION

BY MR. TREMAN:

* * *

[11] Q Where was Mr. Gouveia relative to you?

A Several, two, three tables away, maybe.

Q Did you recognize any of the inmates with whom he was seated?

A I recognize all the inmates around there. I've been seeing them for so long. I don't recall exactly who was sitting with him, no.

Q But you have a distinct recollection of seeing Mr. Gouveia between the hours of 10:30 and 11:00 in the brunch hall; is that correct?

A Yes, I'm pretty sure.

Q When was the next time that you saw Mr. Gouveia on that date, sir?

A On my way to the visit.

Q And what time was that?

A About 12:00. 12:00, 12:30, something like that. In between that hour.

Q Well, let me ask you a question about visits, sir. In connection with a visit, do you have to sign in or sign out?

A You get a pass from the officer and you go direct to the visiting hall, and you get searched by an officer, and he lets you in, and you turn your pass over to an officer [12] in the room, and you can't leave again.

Q Is a record kept as to the time of visits and who visits on there?

A It must be, because they have your record and who comes to see you and all that.

Q And you're able to place the time that you saw Mr. Gouveia based upon the time that you had the visit; is that correct, sir?

A Just about.

Q So that if the visit was sometime after 12:00 o'clock, you would say that you saw Mr. Gouveia sometime after 12:00 o'clock; isn't that correct, sir?

A Well, it was about that time. No—it will vary, say, fifteen minutes or so.

Q Well, you don't have a specific recollection of the time, do you, sir?

A No.

MR. DEIXLER: Your Honor, may I approach the witness with a document which I'd like to be marked government's next? Before I do, I'd like to show it to defense counsel.

THE COURT: Very well.

(Brief pause.)

THE COURT: Do you wish the entire document marked or just a particular page?

[13] MR. DEIXLER: Just the particular page, please.

THE COURT: All right.

(Plaintiff's Exhibit 27 was marked for identification.)

MR. TREMAN: Your Honor, can we approach the side bar?

THE COURT: Yes.

(The following proceedings were had between the Court and counsel at side bar, outside the hearing of the jury:)

MR. TREMAN: Can I ask the purpose that this document is being shown to the witness?

THE COURT: Mr. Deixler.

MR. DEIXLER: Yes, your Honor. He testified he's able to place Mr. Gouveia where he placed him based upon the time of the visit, and he says he doesn't really have specific recollection regarding the time. The document indicates that he went out on his visit at 1:40 in the afternoon, not at 12:00 o'clock. I believe it would be five or six lines from the bottom, next to the word "Olvera."

MR. TREMAN: I don't know what that—

THE COURT: Well, have counsel seen this?

MR. DEIXLER: Yes. I have just shown it to him.

THE COURT: All right.

[14] MR. TREMAN: I don't know what the document reflects as far as who filled it out or when it was filled out, your Honor. I don't believe counsel intends to represent its in his handwriting and I don't believe that there's any foundation laid that, seeing this document or any other document, that he needs to see to have his recollection refreshed, number one, and whether or not it would be refreshed if he saw it.

THE COURT: Well, I don't think there's any requirement that there be a previous showing that his recollection would be refreshed. He can look at this and say, "No. It's wrong," or "No, it doesn't refresh my recollection," or "Yes, now that I think about it, it does refresh my recollection," and we'll have an answer. I think to be, of course, complete impeachment, there would have to be some custodian of the records brought in to demonstrate this. But it can be used to refresh his recollection. And it may or may not refresh his recollection.

MR. TREMAN: Okay. I would ask that the whole packet that this came out of be kept or marked by the Court, because I have previously talked to the officials at Lompoc and requested information about these visiting records, and was advised that they were destroyed. So at least I'll get the opportunity to look at the remaining material that's [15] in there.

THE COURT: All right. If it's agreeable with counsel, I'll return this document, from which only one page has been removed and marked as Government's—

What's the number?

THE CLERK: 27.

THE COURT: 27. Of course, you may examine it with Mr. Deixler.

Let's proceed.

MR. TREMAN: Thank you. (Whereupon, proceedings were resumed in open court, within the hearing of the jury.)

BY MR. DEIXLER:

Q Mr. Olvera, I'd like to direct your attention to Exhibit 27, the line five lines from the bottom, and ask you to read across and tell me whether this refreshes your recollection as to when you entered the visiting room on November 11, 1978.

THE COURT: Just read it to yourself, sir.

BY THE WITNESS:

A I don't believe it was that late.

Q It does not refresh your recollection; is that correct?

[16] A No.

Q Would you please describe where you saw Mr. Gouveia when you saw him in the afternoon of November 11, 1978.

A I believe he was going to the movie.

Q He was going to the movie?

A Yes.

Q And where were you when you observed him, please?

A I was going into the visiting room.

Q Did you stop and talk with Mr. Gouveia?

A I don't think so.

Q Did you say hello to him?

A I might have nodded.

Q Who was Mr. Gouveia walking with?

A I don't remember.

MR. TREMAN: Objection, your Honor. Assumes a fact not in evidence, that this witness ever—

THE COURT: Well, the answer may remain.

BY MR. DEIXLER:

Q But you do recall seeing Mr. Gouveia around 12:00 noon in the main corridor; is that correct?

A Yes.

Q When was the next time you saw Mr. Gouveia on that date?

A I believe at the movie that evening.

[3] LOS ANGELES, CALIFORNIA, THURSDAY,
SEPTEMBER 25, 1980

* * *

STEPHEN A. BROUGHTON, called as a witness by defendant Gouveia, being first fully sworn, was examined and testified as follows:

THE CLERK: Please state your full name and spell your last name.

THE WITNESS: Stephen Allen Broughton.

THE CLERK: Spell your last name, please.

THE WITNESS: B-r-o-u-g-h-t-o-n.

THE CLERK: Thank you, sir.

DIRECT EXAMINATION

BY MR. TREMAN:

* * *

[13] BY THE WITNESS:

A I'll say 10:30, then. I don't know exactly.

Q Who did you have brunch with?

A Bobby Chase, Raymond Olvera. People that lived in the unit. I can't recall exactly who I sat at the table with.

Q Did you see Mr. Gouveia at brunch?

A Yes, I did.

Q Did Mr. Gouveia live in your unit?

A No, he didn't.

Q What unit did you live in?

A C Unit.

Q What unit did Mr. Gouveia live in?

A K Unit.

Q Where was Mr. Gouveia sitting relative to where you were sitting at brunch?

A I don't know. It couldn't have been two or three tables away, where everybody sits in a certain area. They only got so many tables.

Q Well, which was it, two or three tables away?

A Three tables.

Q Who was sitting at Mr. Gouveia's table?

A I can't recall.

Q Who was sitting at the table next to you, between [14] Mr. Gouveia and yourself?

A I don't know.

Q Who was sitting at the table after that?

A I don't know.

Q What was the time of day when you first saw Mr. Gouveia having brunch?

A 10:30. Between 10:30 and 11:00.

Q So Mr. Gouveia arrived after you were there; is that correct, sir?

A I don't know if he arrived first or not. I'm telling you, they called one unit and then they called another. Everybody just goes at one time, you know. They have a line, you go through it, and then everybody sits down.

Q Did you see Mr. Gouveia when you were in line?

A I can't recall if I seen him in line or not. I seen him sitting down at the chow hall.

Q What time did you first see him sitting down at the chow hall?

A 10:30.

Q You're certain of that?

A No, I'm not certain of that. I'm telling you, between 10:00 and 11:00. I can't say exactly what time.

* * *

[16] Q When, then, did you see Mr. Gouveia in the hallway near M Unit relative to when you had brunch?

A It was right when we came out of brunch. I'm not exact—I don't know exactly where I did see him in the hallway. The hallway is very long.

Q Who was Mr. Gouveia standing with when you saw him in the hallway?

A I don't know.

Q Was he standing by himself?

A I can't recall.

Q When did you see Mr. Gouveia next on November 11th?

A In the gymnasium

Q What part of the gym?

A Upstairs, where the pool hall, shuffleboard, pingpong room is.

Q About what time was that?

A I'd say 12:30.

Q What is the basis for your putting the time at 12:30, sir?

A Just that's what time I thought I went up there.

Q Well, did you look at a clock in the gym before you went up there?

A No, I didn't.

* * *

[20] A I can't say exactly what time.

Q But it was about the same time you saw Mr. Ramirez, Mr. Reynoso and Mr. Gouveia; isn't that correct?

A Right.

Q And you saw all those people upstairs near the pool hall; isn't that correct?

A Yes.

Q Did you see Mr. Kinard up there at that time also?

A I can't remember if I seen him or not.

Q On November 11, 1978, when was the first time you saw Champ Reynoso?

A At brunch.

Q What time was that?

MR. ARAUJO: I'm going to object, your Honor. It's been asked and answered several times.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A Between 10:00 and 11:00.

You keep asking me certain times, and how can I remember certain times over two years ago?

Q I can't imagine.

A I can't either.

* * *

[21] BY MR. DEIXLER:

Q Who was Mr. Reynoso having brunch with when you saw him?

A I can't say for sure.

Q Where was Mr. Reynoso compared to you when you were having brunch?

A Close by. Like I said, there's only so many tables in the chow hall, and everybody sits there all close by.

Q Was he sitting with Mr. Gouveia?

A Probably.

Q Was he having brunch with Mr. Flores?

A Yeah, I imagine so. They're in the same unit. They let us out unit by unit.

Q Is the Mr. Flores that you recall having brunch with Mr. Reynoso in the courtroom today?

A Yes, he is.

* * *

[31] Q Mr. Broughton, did you know on November the 11th, 1978, that you would be called as a witness in any case involving your activities of November 11, 1978?

A No, I didn't, not till right now.

Q Did you make a list of the individuals that you saw on November the 11th, 1978?

A No.

Q Did you have any reason to believe or to suspect that your account of those activities might be questioned two years down the road?

A No, I didn't.

MR. ARAUJO: I have no further questions.

THE COURT: Thank you.

Mr. Walsh.

* * *

LOS ANGELES, CALIFORNIA, FRIDAY, SEPTEMBER 26,
1980

* * *

PAUL LEROY ALLEN, called as a witness by the defendant Gouveia, being first duly sworn, was examined and testified as follows:

THE CLERK: Please state your full name and spell your last name.

THE WITNESS: Paul Leroy Allen, A-l-l-e-n.

THE CLERK: Thank you, sir.

DIRECT EXAMINATION

BY MR. TREMAN:

* * *

[6] Q Do you recall what day of the week this was?

A As I recall, it was—it was a weekend, either Saturday or Sunday, and I—I feel almost sure it was Saturday.

Q Okay. Now, you indicated that you were in the hospital at this period of time on this day. Now, how did you come to see Mr. Gouveia in K Unit?

A I asked to—well, I got a pass from the hospital to go to my unit to make a telephone call.

Q Where within K Unit did you see Mr. Gouveia?

A In the area of the phone booth, which would be on the flats, near the front of the building.

Q Did you have any contact with Mr. Gouveia when you saw him in the location you've indicated on this day?

A Yes, I did.

Q And what was the nature of the contact that you had with him?

A It was—I was in the hospital, and I had been in a period of a couple of months of declining health and had been in the hospital once previous to this, and he was inquiring about my health, as to whether or not I was getting any better and so forth.

Q For approximately how long did you have contact [7] with him in the unit on this particular day?

A I would say fifteen, twenty minutes, possibly a half hour.

Q Can you give me a time or a time frame within which this contact occurred that you've testified to?

A Not—not precisely, but it would be somewhere between the hours of 11:00 and 1:00 o'clock.

Q How is it that you arrive at that time frame for the contact that you've testified to?

A Well, the breakfast meal, the weekend breakfast meal, is what they call brunch there, and it's not served in the hospital until approximately 10:30, and one of the—one of the reasons that I had to wait to get out of the hospital to make the call was, I had to wait until after the brunch to go to the unit to make the call.

Q And how is it that you fix an ending time for the time frame that you've given us?

A Well, because I was in the unit quite a while, in that there's a very lengthy phone line in there on the weekend.

Q Thank you.

MR. TREMAN: I have nothing further at this time.

THE COURT: Thank you.

Mr. Deixler.

[8] CROSS-EXAMINATION

BY MR. DEIXLER:

Q Mr. Allen, in this conversation you recall having with Mr. Gouveia, where was Mr. Gouveia standing when you had the conversation with him?

A In the area of the phone booth, the pool table.

Q Was he on line with you?

A Quite possibly. I'm not—I'm not certain of that.

Q Who else was with Mr. Gouveia at the time this conversation took place?

A Oh, there was several people around there. Most of them were inquiring—making the same inquiries he was, as to how I was feeling and so forth.

Q Who else made those inquiries?

A Oh, Danny Padilla, Pete Vanblairkam (?), and probably many more.

Q But none that you can recall now; is that correct?

A There's another fellow with—named Kenny with a difficult last name to remember.

Q Did all of these individuals stay with you and Mr. Gouveia for the entire conversation?

A No.

Q Who left first from that conversation, then?

A That I—I can't recall that.

[9] Q Approximately how long did that conversation take place?

A Possibly fifteen minutes, a half hour.

Q Would you describe what was said in that conversation, please.

A Well, basically, just "How are you doing?" and "You getting any better?" And I'm telling him that I'm getting some rest and medication and so forth, and that I was feeling somewhat better. And just general institutional gossip more or less.

Q Well, what do you recall being discussed?

A Football, for one thing.

Q Oklahoma-Nebraska football game?

A Well, I'm not that big of a football fan, so I don't specifically recall that.

Q Well, what do you specifically recall being discussed?

A Just the general thing on football, sports, and—small talk, you know, is all I can describe it as.

Q Would you regard this fifteen-to thirty-minute conversation as a lengthy conversation with Mr. Gouveia?

A Under the circumstances, no.

* * *

[4] LOS ANGELES, CALIFORNIA, FRIDAY,
SEPTEMBER 26, 1980

* * *

WILLIAM A. GOUVEIA, one of the defendants herein, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

THE CLERK: Please state your full name and spell your 1st name.

THE WITNESS: William A. Gouveia, G-o-u-v-e-i-a.

* * *

DIRECT EXAMINATION

BY MR. TREMAN:

[22] Q Who did you talk to?

[23] A I can't remember all that.

Q Did you see Mr. Reynoso in the yard?

A I don't know.

Q Did you see Mr. Kinard in the yard?

A No. I seen him in the morning.

Q What time did you see Mr. Kinard in the morning?

A It was before brunchtime, when I went out to work out at the weight pile.

Q And he was with you?

A No.

Q Where was he?

A He was off to the side right there, watching people working out.

Q When you went to the yard after brunch, who else did you see?

A After brunch?

Q Yes.

A After brunch?

Q Yes.

A Man, there's all kind of people out there. I can't recall. You know, there's—you're talking about hundreds of people walking around in a yard.

* * *

[25]

Q About what time do you remember seeing Mr. Reynoso [26] up there?

A I don't know. It's in the afternoon, after I left the movie.

Q About 2:00 o'clock, sir?

A What?

Q Was it about 2:00 o'clock?

A Could have been around that time.

Q Do you know an inmate named Willard Taylor?

A Yes.

Q Do you recall seeing Willard Taylor on November 11, 1978?

A Oh, yes. He lives in my unit.

Q Do you recall seeing Willard Taylor between the hours of 12:30 and 1:00 o'clock?

A No.

Q When in the afternoon can you recall seeing Willard Taylor, if at all?

A In the afternoon?

Q Yes.

A Probably—I probably had seen him—I don't know. In the afternoon, when I come back from the gym. He's in the unit. Or evening sometime there, you know before chow.

Q After brunch, when was the next time you saw Steven Kinard on November 11, 1978?

[27] A After brunch? I don't know. He might have been walking around somewhere. I might have passed him out in the yard somewhere or something, or hallway, or I don't know.

Q What time do you recall passing him in the yard, sir?

A I say, I don't recall if I passed him in the yard or the hallway.

Q Well, you recall seeing him in the gym, do you not, sir, in the afternoon?

A In the gym in the afternoon? No, I didn't see him in the gym. I seen him in the weight pile in the morning.

Q Do you recall seeing Mr. Segura in the gym in the afternoon?

A No, not really. I don't recall that.

Q Do you recall seeing Mr. Broughton?

A Yeah, Sam.

Q Who was he with?

A I don't know who he was with. He was playing shuffleboard.

Q Do you recall seeing Mr. Palacios?

A Yeah, I seen Tony around. I don't know when it was in the gym there, though. I remember seeing him over in the gym, you know.

Q When was the first time on November 11th that [28] you can recall seeing Robert Ramirez?

A I guess I'd say the first time I seen him probably was at brunch. Seen everybody at brunch. Or he might have been outside in the yard, walking around or something.

Q Who do you recall seeing him with?

MR. TREMAN: Objection, your Honor. That assumes a fact not in evidence.

THE WITNESS: I barely recall seeing him.

THE COURT: Overruled.

BY MR. DEIXLER:

Q I am sorry, sir. I didn't hear your answer. Would you repeat it, please.

A I barely recall seeing him or anything, you know. I don't recall who he was walking with or anything. I'm speculating, you know, that he's walking past me or something; you know what I mean?

Q What were you doing between the hours of 12:00 and 1:00 on November 11, 1978?

A Well, for a while I was in the gym, if you figure like that. I probably was in the unit too. I was in the unit.

Q Okay. What time between the hours of 12:00 and 1:00 were you in the unit?

A That would be hard to say [29] Q Well, closer to 12:00 or closer to 1:00?

Q Who were you in the unit with?

A I wasn't with nobody really.

Q Well, you recall seeing Steven Kinard in the unit about that time, don't you?

A No.

Q Do you recall seeing Willard Taylor about that time?

A No.

Q Who do you recall seeing between the hours of 12:00 and 1:00?

A Well, when I was there, I was over by the TV. You know, Danny and them, Little Tony. And then when—yeah. I remember what's his name, old man Paul, when he came in to make his phone call. I didn't even remember that till he came up here. That slipped my mind completely. He just come back from the hospital and make a phone call.

Q What time do you recall seeing him?

A Before the movie time.

Q Five minutes before the movie?

A I can't—I can't recall that.

Q Where did you see him?

A In the unit, right there on the flats.

Q About 1:00 o'clock; would that be a fair [30] statement, sir?

A No statement would be a fair statement right there.

Q Well, about how long after you saw Mr. _____ is it hall, H-a-l-l?

A Paul Allen.

Q Oh. Mr. Allen. How long after you saw Mr. Allen did you go to the movie?

A I don't know. Can't say.

Q How long after you saw Mr. Allen did you go to the gym?

A Did I go to the gym? Man, I went—I went to the gym after the movie.

Q How long after the movie did you go to the gym?

A I was only in there a little while.

Q How long were you in the movie?

A Can't say for sure.

Q Do you recall seeing Pedro Flores on November 11, 1978?

A Well, to be sure, no.

Q Do you recall having brunch with him?

A No.

Q Do you recall having dinner with him?

A No.

Q Do you recall having dinner?

[31] A Yeah. I eat every meal.

Q What time did you go to dinner on November 11, 1978?

A I don't know. They run it, I don't know—ran about—I don't know. Might have been between 5:00 and 6:00, somewhere in there.

Q Do you recall with whom you ate dinner?

A No.

Q Why don't you look at page 2 on the FBI 302, the first paragraph. Read it to yourself and tell me whether that refreshes your recollections as to who you had dinner with on November 11th.

A Okay.

Q Does that refresh your recollection?

A Yeah, it refreshes it to a certain extent.

Q Do you now recall that you had dinner with Steven Kinard?

A He goes to chow with me from my unit.

THE COURT: Well, listen carefully to the question, sir, and please answer the question.

BY MR. DEIXLER:

Q Do you now recall that you had dinner with Steven Kinard?

A Yeah. He went to the chow hall with me.

Q Do you now recall that you had dinner with Pedro [32] Flores?

A I don't know. See, he was working. I don't know if he was working or not, if he was in there.

Q Do you now recall that you had dinner with Champ Reyneso?

A He could have been there.

Q Do you now recall that you had dinner with Philip Segura?

A He could have been there too.

Q But you have no recollection at all; is that correct, sir?

A I can't—you know, to be truthful, I can't say anybody—

Q In fact, you have no explanation for what you are doing on November 11, 1978, do you, sir?

MR. TREMAN: Objection, your Honor. Argumentative.

THE WITNESS: Yes, I do.

THE COURT: Just a moment.

MR. DEIXLER: I have no further questions of the witness.

THE COURT: Anything further?

MR. TREMAN: I ask that the—

Nothing further, your Honor.

THE COURT: Thank you. You may step down.

You may call your next witness, gentlemen.

* * *

[3] LOS ANGELES, CALIFORNIA, TUESDAY,
SEPTEMBER 30, 1980

* * *

Tony Estrada, called as a witness by defendant Gouveia, being first duly sworn, was examined and testified as follows:

THE CLERK: Please state your full name and spell your last name.

THE WITNESS: Tony Estrada. Last name's spelled E-s-t-r-a-d-a.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. TREMAN:

* * *

[21] THE COURT: Mr. Gouveia.

MR. TREMAN: That's Willie.

THE COURT: I think your question—

THE WITNESS: Yeah, I know it. But I don't remember. You're talking about a long time ago.

THE COURT: All right.

BY MR. TREMAN:

Q Did it ever come to your attention that Willie had been placed in administrative segregation?

A Not that I can—I'm not sure. I can't really recall that.

Q Did it ever come to your attention in November of 1978 that an inmate had been found dead within M Unit within the Lompoc correctional facility?

A Yes.

Q All right. Now, can you tell me, with relationship to when that information came to your attention, when the conversation with Flappers took place?

THE COURT: Perhaps we can establish first, Mr. Treman, when the information came to his attention.

MR. TREMAN: All right.

Q Can you tell me when the information concerning the inmate being found dead in the institution in M Unit came to your attention?

[22] A In the afternoon sometime, around count. Sometime around count time, I guess.

Q All right. Now, with regard to when that information concerning the inmate in M Unit that came to your attention in the afternoon, when was that in relationship to the conversation with Flappers?

THE COURT: Again, perhaps before we get to the conversation with Flappers, can we determine what day the information was regarding the death?

MR. TREMAN: Okay.

Q Can you tell me, if you know, the day of the week that the information concerning the death—

A I'm not sure what day it was.

Q Do you recall if it was a weekday or a weekend?

A I'm not even sure.

Q Did you see Mr. Gouveia in the unit, K Unit, the day after the information came to your attention concerning the inmate being found dead in M Unit?

A Yeah, he—he had been—he had been in the unit all that afternoon.

* * *

[30] THE COURT: Well, the prison telegraph seems to sputter under this witness. He doesn't know the nickname of the decedent, he doesn't know the decedent's name, he doesn't know that he went into segregation. I think that you're certainly entitled to develop it, but I think that Mr. Deixler has put his finger on it: that we don't know when he received the information. If you can establish that the information he received was on the day of the murder, then I think you've laid your foundation, but at the present time, I don't believe you've laid that foundation. You're not precluded from attempting further, despite this witness's obvious lack of recollection of many of the events that occurred. You're not precluded from attempting further, but I still think there's a hiatus between when he learned and [31] was that indeed the day or the day after or two days after, that type of thing.

MR. ARAUJO: Your Honor, for the record, I would like to point out that I believe that's a question of fact for the jury to decide. I certainly think there's enough evidence. The Court has allowed in a shoe print in this case where there was no direct evidence that it was in fact made by that particular shoe. I think, in all fairness, that the jury should be allowed to hear this evidence and decide whether or not it took place that day or took place some other day. I certainly think there is a sufficient amount of evidence at this point where a jury can draw the conclusion that this event took place the same day or at some other subsequent day. As far as I know, there was no two or three murders in Lompoc during the month of November, there's only been one murder, and—

THE COURT: Well, there's no question that there was only one murder during the month of November, but there is a question, at least in the Court's mind, as to when this witness learned about it.

MR. ARAUJO: I understand that.

THE COURT: Counsel assured me that the possession of knives is rampant throughout the population of Lompoc, and I think it's therefore incumbent upon counsel to establish [32] that what he saw was concurrent with the episodes that we're involved in and not some other episodes.

MR. ARAUJO: I understand that. But your Honor has precluded us from bringing up the fact that knives are rampant in Lompoc at every turn, at every juncture. There's no evidence before the jury that there are any knives at Lompoc other than these three knives. And I certainly think that Mr. Treman has laid a sufficient foundation where the jury should hear the evidence. This is an event that took place two years ago. We've argued our pretrial motions for delay and the problems that would be created by lapse of memory. I think these are problems that were created by the government, and I don't think that the defense should be held responsible for the lack of memory as to the particular date, whether it was November 11th or November 15th or November the 14th or whenever. I think that, in all fairness, there should be some leeway on the part of the Court. This is an event that took place two

ago. We've made our motions on pretrial of preindictment delay. Those motions have been denied. Now, I would assume that, in all fairness, we have laid a sufficient foundation for the jury to at least consider the evidence.

THE COURT: Well, the Court has to rule as it [33] sees fit, using its discretion. This witness's memory is at best a faded pastel of what was once a brilliant picture. Whether it ever encompassed the name of the decedent, his nickname, the fact that anybody had been put in segregation, is of extreme doubt to the Court. And I think because of the fact his recollection is so deficient in so many areas, that there must be a specific demonstration of when this event occurred. Now, that's the foundation that's necessary. If that's made, then these matters are admissible. That will be the ruling of the Court.

(Whereupon, proceedings were resumed in open court, within the hearing of the jury.)

BY MR. TREMAN:

Q Mr. Estrada, what is it that causes you to remember this conversation with Flappers?

A Because I was upset at him.

Q Why were you upset at him.

A Well, because he made some little—you know, we were upset about some smoke, and he was—I was upset because I didn't get any of it.

* * *

[44]

Q And how many quarter-inch pieces of metal did you see sticking out, sir?

A Hey, when I seen that, I didn't—you know, I didn't pay no—I just—I really didn't pay that much attention to it till he ran the trip to me.

Q And what else did you see on that quarter-inch of metal?

A That was it.

Q Was it shiny?

A Not—no, not that I can recall.

Q Was it bloody?

A No, not that I can recall.

Q Was it dirty?

A Not that I can recall.

Q What time did you see this quarter-inch piece of metal?

A Could have been anywhere between 1:00, 2:00. I don't know. Somewhere in there. 1:30, 12:00. Like I explained to him.

Q You're not really sure when you saw it?

A Could have been anywhere like 1:00, 12:30, or 1:00 o'clock.

Q Or 2:00 o'clock?

[45] A Or 2:00 o'clock or any time like that. 1:00 o'clock.

Q Fine.

MR. DEIXLER: I have no further questions, your Honor.

THE COURT: Anything further, gentlemen?

Thank you, sir—

MR. ARAUJO: I just have—

THE COURT: I'm sorry. Go ahead.

CROSS-EXAMINATION

BY MR., ARAUJO:

Q Mr. Estrada, could you have seen that package as early as 12:00 o'clock?

MR. DEIXLER: Objection. Leading.

THE COURT: Sustained.

BY THE WITNESS:

A Earlier.

THE COURT: Just a moment.

BY MR. ARAUJO:

Q You've indicated the times of 12:30, 1:00 o'clock, 2:00 o'clock. You're not certain. How much earlier than 12:30 could you have seen those knives?

A Could have been earlier.

Q How much earlier?

[46] A Well, could have been 12:15 maybe, 12:25, somewhere in there. Could have been anywhere in there.

Q Could it have been any earlier than 12:15?

A Earlier?

Q Yes.

A I don't—I'm not sure.

Q Okay.

A Could have.

Q Excuse me?

A It could have.

MR. ARAUJO: I have no further questions.

THE COURT: Anything further, gentlemen?

Anything further, Mr. Deixler?

MR. DEIXLER: Nothing further, your Honor.

THE COURT: Thank you. You may step down.

Chronological List of Relevant Docket Entries—
Mills, Pierce

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

United States v. Robert Eugene Mills and
Richard Raymond Pierce, CR-80-278-01-WPG,
CR-80-278-02-WPG

Date	Proceeding
3.27.80	Indictment filed
4.21.80	Arraignment; attorneys appointed for defendants; trial date set for 6.30.80
5.27.80	Order concerning disclosure of witness statements
5.29.80	Order concerning disclosure of grand jury state- ments and identity of witnesses
6.30.80	Order appointing expert witness Dykstra; trial date continued to 7.22.80
7.10.80	Order staying government production of state- ments of inmate witnesses until 7.14.80
7.17.80	Order concerning discovery; trial date continued to 7.29.80
7.21.80	Hearing; motion to dismiss indictment granted
8.14.80	Order dismissing indictment filed
8.19.80	Government notice of appeal filed
8.21.80 through	
3.16.81	Orders concerning transportation of witnesses
2.24.81	Order granting application of defendant Mills for appointment of investigative agency
4.6.81	Court of appeals opinion reversing dismissal of in- dictment
7.7.81	Court of appeals opinion amended
8.10.81	Status hearing; trial date set for 10.13.81
10.13.81	Petition for certiorari denied
10.114.81	Writs issued for inmate witnesses
10.22.81	Order granting defendants' application for appoint- ment of witness Bucklin
10.23.81	Trial date continued to 1.5.82
11.13.81	Order granting defendants' application for appoint- ment of expert Fox
11.13.81 through	
12.9.81	Orders concerning inmate witnesses, transporta- tion of witnesses, interviews of witnesses by de- fense attorneys
1.5.82	Trial begins

- 1.13.82 Motion for judgment of acquittal denied
- 1.27.82 Jury begins deliberations
- 1.28.82 Jury returns verdict of guilty as to both defendants
- 3.22.82 Motion for judgment of acquittal denied; defendants sentenced
- 3.24.82 Notices of appeal filed by defendants

**UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

Mills, Robert Eugene No. 82-1493
Pierce, Richard Raymond No. 82-1494
 Proceedings

- | Date | |
|----------|--|
| 11.15.82 | Case consolidated with <i>Gouveia</i> et al. |
| 12.15.82 | Oral argument |
| 4.26.83 | En banc court of apeals reverses judgment of district court and remands with instructions to dismiss the indictments |
| 5.16.83 | Court of appeals issues stay of mandate |
| 10.17.83 | Order of Supreme Court granting petition for a writ of certiorari |

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

September 1979 Grand Jury

CR 80-278

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ROBERT EUGENE MILLS, RICHARD RAYMOND PIERCE,
DEFENDANTS

INDICTMENT

[18 U.S.C. § 1111: Murder, 18 U.S.C. § 113(c): Assault With
Dangerous Weapon; 18 U.S.C. § 1792: Conveyance]

The Grand Jury charges:

COUNT ONE

[18 U.S.C. § 1111]

On or about August 22, 1979, at the Federal Correctional Institution at Lompoc, California, within the Central District of California, within the special maritime and territorial jurisdiction of the United States, defendants ROBERT EUGENE MILLS and RICHARD RAYMOND PIERCE, with premeditation and malice aforethought, did willfully, deliberately and maliciously murder Thomas Hall by means of a knife.

COUNT TWO

[18 U.S.C. § 113(c)]

On or about August 22, 1979, in Santa Barbara County, at the Federal Correctional Institution at Lompoc, California, within the Central District of California, within the special maritime and territorial jurisdiction of the United States, defendant RICHARD RAYMOND PIERCE, with intent to do bodily harm and without just cause or excuse, did assault Gary Howard Mellen with a knife, a dangerous weapon.

COUNT THREE**[18 U.S.C. §1792]**

On or about August 22, 1979, at the Federal Correctional Institution at Lompoc, California, within the Central District of California, defendants ROBERT EUGENE MILLS and RICHARD RAYMOND PIERCE conveyed from place to place within the Federal Correctional Institution a knife designed to kill, injure and disable an officer, agent, employee or inmate thereof.

A TRUE BILL*/s/* _____*Foreperson**/s/* _____

ANDREA SHERIDAN ORDIN
United States Attorney

**DECLARATION OF EDWIN S. SAUL IN SUPPORT OF
MOTION TO DISMISS ON GROUNDS OF
PRE-INDICTMENT DELAY**

I, EDWIN S. SAUL, declare:

(1) I am an attorney licensed to practice law by the State of California and admitted to practice before the within Honorable Court. My office is located on the 9th Floor of the Crocker Bank Building, 15760 Ventura Boulevard, Encino, California. If called to the stand as a witness I could testify to the following facts from my own personal knowledge, except as otherwise indicated to the contrary.

(2) The facts in this case indicate that a murder and an assault were committed in the Federal Correctional Institution at Lompoc, California, on August 22, 1979, at approximately 5:05 P.M. The Indictment was not filed until March 27, 1980, and alleges in addition to the murder and assault, another count dealing with the alleged transportation within a correctional institution of a weapon. 18 *United States Code* § 1792.

(3) The Government started its investigation almost immediately after the occurrence; and, in fact, both of the Defendants were "arrested" and questioned on that very same evening. It also appears that both of these Defendants were placed in Unit I, the isolation unit, during the evening hours of August 22, 1980. They remained in isolation (or "in the hole") for a period of approximately eighteen months. Mr. Richard Raymond Pierce by virtue of this Motion does hereby allege that delay caused to violate his right to a speedy trial, as that right is guaranteed by the Sixth Amendment of the United States Constitution; and, also, violated his right to the assistance of counsel. The information furnished to the Defendants by the Government through the discovery process clearly shows that Mr. Pierce did on August 22, 1979, almost immediately after he was questioned, request the assistance of an attorney.

(4) Had an attorney been appointed for Mr. Pierce on or about August 22, 1980, that attorney would have been able to do many things to help prepare a defense for Mr. Pierce in this case. Perhaps first among the things that the attorney would have wanted to do would have been to take steps

to preserve certain types of evidence, possibly including a request for a second autopsy, or for certain things to be looked for in the autopsy that was in fact performed. There were many items of physical evidence available on the evening of August 22, 1979, including clothing, blood smears on the floor, footprints, a weapon, stocking caps, the dead body of the alleged victim Hall, and the live body of the alleged body Mellon.

(5) Of course, which an attorney would have sought about doing immediately would have been the interviewing of potential witnesses. I was personally appointed to represent Mr. Pierce in this case on or about May 22, 1980, and did in fact start out to find potential witnesses on Mr. Pierce's behalf almost immediately. I was first hindered by virtue of the fact that Mr. Pierce himself had forgotten a good deal between August of 1979 and May of 1980. Although he did make some notes regarding his whereabouts at the time of the murder, those notes were placed in his property which I have not yet been able to obtain even though I believe I have made diligent efforts to do so. Mr. Pierce did not, however, have any knowledge of the possibility that his activities on the day of August 21, 1979, would have been relevant and made no effort whatsoever to even try to recall his whereabouts on that day or the people whom he might have seen.

(6) Although, as indicated above, I believe I have made extensive effort to find witnesses and have in fact found some, I sincerely believe that there were other witnesses who could have been called to the stand to testify on Mr. Pierce's behalf who we will now never find. In addition, some of the names which Mr. Pierce has given to me have not as yet been located. Since I have not yet completed my efforts in trying to locate these witnesses, and have an appointment to visit the correctional institution at Lompoc, California, on July 1, 1980, I am not going to specify the names of the witnesses who I am still looking for in particularity in this Declaration. If this Motion is not heard on June 30, 1980, I will file a Supplemental Declaration, but if this Motion is heard on that date I will try to recount to the Court as best as I can, from my notes, the status of my ef-

forts to locate various people. It cannot be overemphasized, however, that the interviews that I have conducted have shown to me beyond any question that there would have been other people who would have come forward, or who Mr. Pierce would have recalled, who will now never be known. Even if there is cause for the delay in the Indictment, which the Government has yet to state, there can be no cause for not having appointed an attorney for Mr. Pierce at the time he requested one so that efforts could have been made to preserve evidence, ascertain the names of witnesses, and make sure that those things that would be of importance to Mr. Pierce's defense were preserved.

(7) One item of physical evidence which the Government to believe indicates Mr. Pierce's guilt is a finger impression mark on his arm. Although a clumsy Poloroid photograph of this impression was taken that night, the officials of the prison who were involved in the taking of the photograph were not in any way looking to analyse this evidence in a manner that would be consistent with Mr. Pierce's defense, and made no efforts to preserve or analyse the mark other than the taking of the picture provided to Mr. Pierce sometime in the month of June, 1980, after a Court order was necessary to obtain proper discovery.

(8) A matter has recently come to my attention which I believe would be included within the work product privilege which I do not choose to waive at this time. I can state without equivocation, however, that based upon this information it would have been important to answer certain questions when the autopsy of Mr. Hall was conducted, and to have available certain information regarding the wounds to Mr. Mellon which have now healed. Because of the delay in the Indictment, and because of the failure on the part of the Government to appoint an attorney for Mr. Pierce, these efforts would now either be extremely difficult (and possibly involving the exhumation of the body of Hall) or, in some instances, totally impossible.

(9) The Government has had almost a year to make this case and Mr. Pierce has, in effect, had since May 22, 1980, to prepare a defense. Even taking the date of the Indictment, March 27, 1980, Mr. Pierce has had only a little bet-

ter than three months to try to prepare a defense (compared to the time which the Government has had which has been since they began their investigation at approximately 10 minutes after 5 on August 22, 1979). There is an obvious prejudice to Mr. Pierce because of the delay, and the prejudice has been compounded by virtue of the Government's failure to provide him with an attorney.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 29, 1980, at Los Angeles County, California.

/s/

EDWIN S. SAUL

DECLARATION OF ROBERT E. MILLS

I, ROBERT E. MILLS, declare and state:

1. I am one of the defendants in this case, and have been an inmate in Federal Prison for approximately 4 years. If called to the stand as a witness I could testify to the facts set forth herein from my personal knowledge.

2. On the evening of August 22, 1979, I was questioned about the murder of Thomas Hall by, among others, F.B.I. Special Agent Thomas Mansfield. Although I consistently stated that I knew nothing of the Hall murder, and that I wanted an attorney present before I answered any questions, I was asked a number of questions about Thomas Hall's death. At some point during the interview, I was asked to sign a waiver of rights form. I refused to sign this form, and again asked that I be provided with an attorney. My request was ignored, and I was told to remove my shirt and pants, and was thereafter examined first by the agents who were questioning me, and, subsequently, by a doctor from the prison. At one point during the physical examination, to which I also objected and with respect to which I also asked to have an attorney present, the agents gripped my left forearm and caused two cuts to open and begin to bleed. At the conclusion of this examination, the clothes I was wearing, as well as my shoes, were confiscated, I was given khaki dress to wear, and sent to the strip cells, which are located in the basement area of the I. Unit, which is the segregation unit or Administrative Detention Unit ("ADU") at F.C.I., Lompoc. The strip cells have only a sleeping cot on the concrete floor. There is a hole in the floor to be used as a toilet, but it can be flushed only by the guards outside the cell. My transfer to ADU took place some time between 7:00 p.m. and 8:00 p.m. on the evening of August 22, 1979.

3. The next morning, I was taken from the strip cell and placed in one of the cells in the upper ranges of ADU. Although I was not questioned again immediately, I recall that about the third day of my detention in ADU, some of the guards started telling me that I was going to be sent to the Marion Control Unit in Illinois. Every inmate knows

that the Marion Control Unit is the maximum security facility in the Federal Prison System, and that you are sent there only if the prison authorities believe that you are very dangerous or have committed a serious crime for which you will be tried. However, I was not asked any further questions about Hall's death until approximately two weeks later when I was taken to a small room at the end of the corridor of the ADU where a hearing was held by the Unit Disciplinary Committee. This committee consisted of one of the counsellors from my previous residential unit in the prison (J-Unit), and my case manager. During that hearing I was told that based on confidential sources they believed I was guilty of the murder of Thomas Hall. I told them again that I had nothing to do with Thomas Hall's murder, and that I wanted to see an attorney. The copy of the incident report which was completed by the prison officials at the conclusion of my UDC hearing, a copy of which I was provided by prison officials, confirms this. See Exhibit A hereto. At the conclusion of my hearing, I was told that I was probably guilty of the murder of Thomas Hall, that I was going to lose all of my good time, and that I was going to be sent to the Marion Control Unit.

4. Approximately one week after the UDC hearing, I was taken back to the same room for a hearing before the Institutional Disciplinary Committee ("IDC"). At this meeting, there were present some senior officials from the prison administration, including a captain and a couple of lieutenants. Again, I asked to have an attorney present and told them that I did not want to answer any questions without the advice of counsel. One of the prison officials at that hearing (I believe it was the captain present) told me that I didn't have a right to an attorney because this was an institutional case, and that for my own good, if I had an alibi, I should tell them who my witnesses were so the IDC could interview them. The captain also asked me if I didn't want to "talk to him in private" about the Hall incident. I was also told that if I wanted, a staff member from the prison would interview the witnesses whose names I gave to the committee instead of a member of the IDC going directly to these inmates. Again, I told the IDC that I had nothing to

do with the Hall murder, and that I didn't want to say anything more until I had an opportunity to talk to an attorney. Also, I wouldn't give them names of witnesses because anyone who has been in prison even a short time knows that it is impossible to give the names of other inmates to federal officials for questioning. The inmates with whom you must live on a daily basis respond very badly to having their name given out in that manner. I asked to have an attorney or some other neutral person (not from the prison) appointed so that that person could talk to my witnesses first. That request was refused by the IDC. At the conclusion of the IDC hearing, I was told that I was guilty of the murder of Thomas Hall, that I was going to lose all of my good time, and that I was going to the Marion Control Unit.

5. Some time after my IDC hearing, I was taken to be interviewed by a man the inmates know as "Stretch". I understand Stretch is a Federal Bureau of Prisons official who goes from prison to prison talking to inmates accused of serious crimes to see if they should be committed to the Marion Control Unit. When I was taken to Stretch, I asked again to see an attorney. Stretch told me I wasn't entitled to one, that he had been told that I was guilty of the murder of Thomas Hall, and that a determination was being made whether to send me to the Marion Control Unit. Obviously, I had been deeply worried from the time I was first interviewed about Hall's death, because it is clear that if the prison authorities believe you have murdered another inmate, the matter won't stop as just an "administrative case." During the time I have been in prison, I have never heard of anyone who is accused of murder who was not made to stand trial in a federal court. Thus, although I was not surprised, I became even more concerned about what would happen to me, when Stretch informed me that from what he had heard the federal authorities were probably going to seek an indictment against me for the murder of Thomas Hall. When I heard that, I again told Stretch that I had to have an attorney. Again, Stretch said that I did not have a right to one.

6. After my meeting with Stretch, I was placed back in ADU, where I remained until I was transported to the Los Angeles County Jail for my post indictment hearing on or about April 21, 1980. At that time, I was finally appointed an attorney.

7. In all, I was held in solitary confinement in ADU for approximately 8 months, from the evening of August 22, 1979, until my release to the Los Angeles County Jail on or about April 21, 1980, subsequent to my indictment. During that time, I was not permitted to have any contact with any other inmates in the prison, to contact potential witnesses, to discuss my case with anyone other than prison officials, to have my own doctor examine the cuts on my forearm, which were initially the subject of physical examination on the evening of August 22, 1979, or to have an attorney to assist me in any way in contacting witnesses, preserving evidence, or generally advising me with respect to the murder charges on which I am now being tried.

8. Until you have been inside the prison, it is difficult to understand the extreme differences between living in the general prison population, which inmates call "Mainlining" and being held in solitary confinement in ADU, or "the hole." A typical day in the general population begins at 6:00 a.m. in the morning when the cell doors are opened up for breakfast, and inmates can leave their cells and walk about the units, and go to the dining hall. At approximately 8:00 A.M., there is a work call, and inmates in the general population go out to their assigned job, which may include, for example, carpentry, work in the cable shop, or work on the grounds. When I was mainlining, I worked in the carpentry shop, until I was injured on the job. During the period of my recovery from that injury, I was assigned the job of sweeping in and around the recreational shack, which is outside the main prison unit. At noontime, the inmates are called back in to the dining hall, and after lunch, return to their work areas until approximately 4:00 p.m., when everyone is required to go back to their cell block for the afternoon count. From approximately 4:00 p.m. until 4:30 p.m., each inmate is locked in his individual cell. This 30-minute period is the only time during the entire day

when inmates are confined to their individual cells. At approximately 4:30 P.M., the cell doors are opened again, and the call of units to the dining hall starts. After dinner, inmates may choose to go see a movie (there are approximately four different movies every week), go to the recreational yard to exercise, go to the gym to exercise or workout, or go back to their cells. At about 8:30 p.m., everyone must return to their respective units, but inmates are not locked into their individual cells at this time, and may move freely about the units. Many of the units have pool tables, and other forms of recreation which are available during this time. At approximately 10:00 p.m., inmates are given the option of going to their cells to go to sleep or going to the t.v. room to watch t.v. Periodically, guards will come to the t.v. room to see which inmates want to return to their cells to go to sleep. The t.v. room is closed down for the night at about midnight. Although I was not a participant at the time I was sent to ADU, there are also available to inmates in the general population a variety of educational programs, including some which lead to college degrees. Also, when you are mainlining, you are permitted to have toiletries, books, and other personal items in your cell. Prison authorities provide each inmate in the general population with a bulletin board in his cell, so that photographs and similar personal items may be put on the wall. In addition, the doors to cells for prisoners in the general population are solid, with a small window, which affords privacy for the inmate when he is in his cell. Inmates in the general population are also provided access to a telephone room, where they can make telephone calls in private. There is no limit to the number of calls that can be placed through this system. Also, for inmates in the general population visiting hours are from 12:00 p.m. to 3:30 p.m. on the weekdays, and from 8:00 a.m. to 3:30 p.m. on the weekends. There are no limitations on the amount of time that inmates in the general population may spend with their visitors, and there is an outside area which has been provided for the use of prisoners and their families.

9. Solitary confinement in ADU or the "hole" is entirely different. Inmates in the hole are held in their cell for the

entire day, with the exception of one 30-minute break. This 30 minutes is the only time during the day when you are permitted out of your cell. During this time, you may shower, and if there is time, exercise. You are permitted absolutely no contact with prisoners, either during the time you are confined to your cell, or during the 30-minute break period. Relief periods are staggered, so that only one inmate in ADU at a time is out of his cell. Once every seven days, the guards take you out of your cell into a stone enclosure outside to exercise for approximately one hour. There is no training equipment in this area, no grass, and no view or access to any other prisoners. The area is entirely concrete, with a concrete floor, surrounded on all sides by concrete walls. This area can get very hot in the summer. Inmates in the hole eat in their cells, and each cell has a toilet. Also, the doors to the cells are comprised of bars, so that there is absolutely no privacy from the guards. Whereas prisoners in the general population are permitted to purchase carpets to put on their floors if they desire, no such privilege is allowed in the hole, and the cement cell floors must remain uncovered. Also, whereas prisoners in the general population are permitted to purchase clothing, toiletries, coffee, and other goods at the commissary, prisoners in ADU have a restricted list of goods which they may purchase from the commissary. For example, you must wear the khaki clothes issued to you by prison authorities when you are in ADU, and you cannot buy any clothes of your own, or wear any clothes which you previously purchased. Also, you are not permitted to purchase any objects that come in metal or glass containers. Inmates held in the hole are permitted one telephone call per month, and this call must be made in the presence of a counselor, guard, or case manager. Visitation hours are the same as those for the general population, but inmates in the hole are limited to two hours with their visitors. Furthermore, at any time more than five inmates from ADU are in the visiting area, the first ADU prisoner to have arrived is taken back to his cell, and his visitation period cut off. ADU prisoners and their families are denied access to the outside portion of the visiting area. In ADU, lights are out

between 9:30 p.m. and 10:00 p.m. Finally, inmates in ADU are not permitted to participate in any of the prison's educational, recreational, or work programs, nor are they permitted any television or movie rights of any kind.

10. Another problem with being held in solitary confinement in ADU is that it creates a bad reputation for the inmate in the general prison population. Some inmates are placed in ADU at their own request for "protective custody". When these inmates are released back into the prison population, it is generally perceived that they cannot be trusted, either because they have informed on other inmates or for some other reason. As a result, their physical safety is in great jeopardy when they are released from ADU. On the other hand, if prison authorities accuse you of having harmed another inmate, and place you in ADU for that reason, it is very likely that the inmate you have been accused of injuring has friends who will mount a vendetta against you when you are returned to the general population. Once in the ADU, there is no way to speak out against the rumors which develop around your placement in solitary confinement. When you are suddenly released back into the population, it can be, and usually is, very dangerous. Basically, it is very difficult to develop a reputation for keeping clear of trouble, and not getting involved in other people's problems. Yet, if you do not achieve this reputation, you are in great jeopardy from other inmates while you are in the prison population. When you are sent to ADU, this reputation is destroyed. Until you prove otherwise, it is generally perceived that you have wronged another inmate, or informed on the general prison population. Inmates in the general prison population refer to prisoners who have come out of ADU as being "shaky". No one in prison is safe with that kind of a reputation.

11. After my incarceration at the Los Angeles County Jail for purposes of my post indictment hearing, I was transported to Terminal Island, where I was held in the Terminal Island solitary confinement unit. Subsequently, I was returned to the Los Angeles County Jail, where I am now being held, pending my trial.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of July, 1980, at Los Angeles, California.

/s/

ROBERT E. MILLS

1. NAME OF INMATE KILLS, Robert		2. REGISTER NUMBER 32281-138(D)		3. DATE OF INCIDENT 8-22-79		4. TIME App 5:10	
5. PLACE OF INCIDENT K-Unit's third floor dorm		6. ASSIGNMENT [redacted]		7. QUARTERS 2-Unit			
9. INCIDENT KILLING & ASSAULTING AN INMATE						10. CODE 1007-21	
11. DESCRIPTION OF INCIDENT Confidential information received indicates that you (KILLS) did stab inmates HALL, Thomas Reg. No. 366b3-136(E) & WELLEN, Gary Reg. NO. 20125-148(E). Inmate HALL died from his stab wounds and inmate WELLEN was seriously injured.							
12. SIGNATURE OF REPORTING EMPLOYEE <i>[Signature]</i> 30:15 PM 8-22-79							
13. NAME AND TITLE PRINTED Fred Muns, Corr. Supv.							
14. INCIDENT REPORT DELIVERED TO ABOVE INMATE BY [Signature]				15. DATE INCIDENT REPORT DELIVERED 8-23-79		16. TIME INCIDENT REPORT DELIVERED 8:40 AM	
PART II - COMMITTEE ACTION							
17. COMMENTS OF INMATE TO COMMITTEE REGARDING ABOVE INCIDENT "I had nothing to do with that. I want to see a lawyer." No other comment							
18. IT IS THE FINDING OF THE COMMITTEE THAT: (X) APPLICABLE BOTH							
<input checked="" type="checkbox"/> YOU COMMITTED THE PROHIBITED ACT AS CHARGED		<input type="checkbox"/> YOU COMMITTED THE FOLLOWING PROHIBITED ACT:				<input type="checkbox"/> YOU DID NOT COMMIT A PROHIBITED ACT	
19. COMMITTEE FINDINGS ARE BASED ON THE FOLLOWING INFORMATION Based on the confidential sources the UDC find [redacted] guilty of the charge.							
20. COMMITTEE ACTION Refer to IAC with the recommendation to forfeit all statutory good time and transfer to the Marine Corps.							
21. DATE OF ACTION Sept 10, 1979 <i>[Signature]</i> <i>[Signature]</i>							

Name of Inmate: HILLS, Robert E. Doc. no. 32287-138(J) Hearing Date: 9-13-79

III. C. (Continued)

4. The following persons requested were not called for the reason(s) given:

5. Unavailable witnesses were requested to submit written statements and those statements received were considered _____

D. Documentary Evidence: In addition to the Incident Report and Investigation, the Committee considered the following documents: _____

E. Confidential Information was considered by the IDC and not provided to Inmate _____

IV. FINDINGS OF THE COMMITTEE

XXX A. The act was committed as charged.

C. No prohibited act was committed:

B. The following act was committed: _____

Expunge according to Inmate Discipline PS.

V. SPECIFIC EVIDENCE RELIED ON TO SUPPORT FINDINGS

Incident report and investigation

VI. SANCTION OR ACTION TAKEN

Forfeit 30 days good time; continue in ADU under Team control. Refer to Marion Control Unit.

Offense Severity Grant

VII. REASON FOR SANCTION OR ACTION TAKEN

Incident report and investigation.

VIII. APPEAL RIGHTS:

_____ The inmate has been advised of the findings, specific evidence relied on, action and reasons for the action. The inmate has been advised of his right to appeal this action within 30 days to the Chief Executive Officer. A copy of this report has been given to the inmate.

IX. INSTITUTION DISCIPLINE COMMITTEE

EXHIBIT A

W. J. R. H.

PTI, Longme, CA

Institution

ADMINISTRATIVE DETENTION ORDER

22 Aug. 79

Date

TO : Special Housing Unit Officer
 FROM : F. ~~WILL~~, Correctional Supervisor
 SUBJECT: Placement of PIERCE, Richard, Reg. No. 20671-148(J)
 In Administrative Detention

The above named Inmate

- _____ (a) Is pending a hearing for a violation of institution regulations;
XX (b) Is pending investigation of a violation of institution regulations;
XX (c) Is pending investigation or trial for a criminal act;
XX (d) Is to be admitted to Administrative Detention

_____ (1) Since he or she has requested admission for protection;

[I hereby request placement in Administrative Detention, for my own protection _____]
 _____ Inmate's Signature

_____ (2) Since a serious threat exists to individual's safety as perceived by staff, although person has not requested admission; referral of the necessary information will be forwarded to the IDC for appropriate hearing.

_____ (e) Is pending transfer or is in holdover status during transfer;

_____ (f) Is pending classification; or

_____ (g) Is terminating confinement in Disciplinary Segregation and has been ordered into Administrative Detention by the IDC.

It is this officer's decision based on all the circumstances that

PIERCE's continued presence in the general

(Inmate's name)

population poses a serious threat to life, property, self, staff, other inmates, or to the security of the institution because of

STABBING OF INMATES HALL #36643-136(E) & #30125-148(E)

Therefore, PIERCE, Reg. No. 20671-146, is to be placed in Administrative Detention until further notice.

*In the case of IDC action, reference to that order is sufficient.
 In other cases, the officer will make an independent review and decision, which is documented here.

cc: Inmate Concerned
 Chief Correctional Supervisor
 Unit Team

Evd + C

FPI, Longme, CA

Institution

ADMINISTRATIVE DETENTION ORDER

22 Aug. 79

Date

TO : Special Housing Unit Officer
 FROM : F. Mills, Correctional Supervisor
 SUBJECT: Placement of MILLS, Robert, Reg. No. 32287-138(J)
 In Administrative Detention

The above named Inmate

- _____ (a) Is pending a hearing for a violation of institution regulations;
XX (b) Is pending investigation of a violation of institution regulations;
XX (c) Is pending investigation or trial for a criminal act;
XX (d) Is to be admitted to Administrative Detention

_____ (1) Since he or she has requested admission for protection;
 [I hereby request placement in Administrative Detention, for my own protection _____]

Inmate's Signature

_____ (2) Since a serious threat exists to individual's safety as perceived by staff, although person has not requested admission; referral of the necessary information will be forwarded to the IDC for appropriate hearing.

- _____ (e) Is pending transfer or is in holdover status during transfer;
 _____ (f) Is pending classification; or
 _____ (g) Is terminating confinement in Disciplinary Segregation and has been ordered into Administrative Detention by the IDC.

It is this officer's decision based on all the circumstances that
MILLS 's continued presence in the general

(Inmate's name)

population poses a serious threat to life, property, self, staff, other inmates, or to the security of the institution because *

PENDING INVESTIGATION IN THE STABBING OF INMATES HALL AND MILLER

Therefore, MILLS, Reg. No. 32287-138(J)
 is to be placed in Administrative Detention until further notice.

*In the case of IDC action, reference to that order is sufficient.
 In other cases, the officer will make an independent review and decision, which is documented here.

cc: Inmate Concerned
 Chief Correctional Supervisor
 .. Unit team
 EYH BT B

DECLARATION OF RICHARD E. DROOYAN

I, RICHARD E. DROOYAN, hereby declare as follows:

1. I am an Assistant United States Attorney for the Central District of California, and have been assigned the case of United States v. Robert Eugene Mills, Richard Raymond Pierce, Case No. CR 80-278-WPG.

2. I am familiar with the facts set forth in this Declaration, and could testify to these facts from my own personal knowledge.

3. In mid-September 1979, I was assigned to supervise an investigation into the murder of Thomas Hall on August 22, 1979, at the Federal Correctional Institution (FCI), Lompoc, California. On September 18, 1979, I had my initial conversation with Special Agent (SA) Tom Mansfield in which he summarized the results of his preliminary investigation.

4. Between September 1979 and March 27, 1980, I had numerous telephone conversations and meetings with SA Mansfield. I repeatedly reviewed the numerous memoranda of interviews he conducted, viewed the physical evidence, toured the Lompoc facility on March 7, 1980, and personally interviewed five inmate witnesses. In addition, I examined witnesses during four sessions of the Federal Grand Jury which returned an indictment in this case.

5. Although a substantial amount of evidence was secured by the end of November 1979, additional evidence which is material to the presentation of the Government's case was obtained up to the time of the indictment. In particular, additional evidence was obtained from Reginald Cook on March 6, 1980 and Fred Medina on March 7, 1980. Prior to this time, I did not know whether either of these inmates would testify at trial.

6. During the four months preceding the indictment, leads were investigated by the FBI. SA Mansfield and I had numerous conversations regarding the results of these investigations and the presentation of the case to the Federal Grand Jury.

7. Although some additional investigation remained to be conducted, the matter was presented to the Grand Jury for

indictment on March 27, 1980, because I felt that Cook and Medina provided additional evidence which substantially strengthened the Government's case. In addition, I had two cases scheduled for trial in April and I felt that I had to seek an indictment by the end of March or delay the presentation until some time in May of 1980.

8. Between September 1979 and March 27, 1980, I was involved in the preparation and trial of three cases. One case lasted six days, one case four and one-half days, and one case one and one-half days. I also prepared two cases which were tried in April 1980. In addition, I was involved in numerous investigations which resulted in the return of five indictments by Federal Grand Juries.

9. My first contact with the Bureau of Prisons officials regarding this case took place on March 7, 1980 when I toured the prison. At no time prior to the return of the indictment did I ever have any discussions with these officials regarding the status of the Government's investigations, the segregation of Mills and Pierce, or the prison's disciplinary proceedings.

10. At no time did I delay the proceedings in this case to obtain some tactical advantage or for any other reasons. At all times, I sought to handle this investigation in a manner that was fair to all concerned.

I declare under the penalty of perjury that the foregoing is true and correct.

DATED: This 14th day of July, 1980.

/s/

RICHARD E. DROOYAN

DECLARATION OF THOMAS G. MANSFIELD

I, THOMAS G. MANSFIELD, hereby declare as follows:

1. I am a Special Agent of the Federal Bureau of Investigation, assigned to the Santa Maria resident agency. I am the case agent responsible for the investigation in *United States v. Robert Eugene Mills and Richard Raymond Pierce*, Case No. CR 80-278-WPG.

2. On August 22, 1979, I commenced an investigation into the murder of Thomas Hall at the Federal Correctional Institution (FCI) at Lompoc, California. Between 6:00 p.m. and 6:30 p.m. on August 22, I was notified by FCI officials that a murder had taken place in the prison at approximately 5:10 p.m. that day. I then proceeded to the prison and arrived at approximately 6:45 p.m. I immediately reviewed the situation with the Correctional Supervisor and other FCI officials. At approximately 7:30 p.m., I examined defendants Mills and Pierce. Thereafter, I took various items of clothing from them, interviewed the prison doctor, prepared a photographic display and interviewed E Unit inmate Gary Mellen in the Intensive Care Unit of the Vandenberg Air Force Base hospital where he was receiving treatment for a stab wound.

3. My activities during the evening of August 22, 1979 were for the purpose of determining who murdered Thomas Hall and obtaining and preserving relevant evidence. At no time did I take custody of Mills or Pierce, place them under arrest, or seek to obtain an arrest warrant.

4. During the evening of August 22, 1979, following Hall's murder, FCI officials briefly interviewed approximately 60 E Unit inmates to determine if anyone had information about the murder. FCI officials also searched the various areas in the prison, including E Unit, the main corridor and J Unit, for weapons and evidence. Stocking caps, a knife and various items of clothing were secured and they were booked into the evidence locker.

5. On August 23, 1979, the Santa Barbara Coroner's Office conducted an autopsy on the body of Thomas Hall.

6. On the following dates, I personally conducted interviews of FCI employees, FCI inmates, and/or other potential witnesses:

a. On August 24, 1979, two employees and one inmate were interviewed at the FCI;

b. On August 31, 1979, two employees were interviewed, and I obtained 23 photographs from Bruce Carter at the FCI;

c. On September 4, 1979, three employees and four inmates were interviewed at the FCI;

d. On September 5, 1979, one employee and six inmates were interviewed at the FCI;

e. On September 7, 1979, one employee was interviewed at the FCI;

f. On September 10, 1979, five employees and five inmates were interviewed at the FCI;

g. On September 12, 1979, one employee and six inmates were interviewed at the FCI;

h. On September 17, 1979, one employee and five inmates were interviewed at the FCI;

i. On September 18, 1979, three inmates were interviewed at the FCI;

j. On September 19, 1979, one employee and four inmates were interviewed at the FCI;

k. On September 20, 1979, two employees and three inmates were interviewed at the FCI;

l. On September 24, 1979, three inmates were interviewed at the FCI;

m. On October 1, 1979, one inmate was interviewed at the FCI;

n. On October 3, 1979, five inmates were interviewed at the FCI;

o. On October 4, 1979, one inmate was interviewed at the San Luis Obispo County Jail;

p. On October 9, 1979, eight inmates were interviewed at the FCI;

q. On October 10, 1979, an employee of the Veterans Administration was interviewed regarding money received by Hall;

r. On October 16, 1979, two inmates were interviewed at the FCI;

s. On October 22, 1979, eight inmates were interviewed at the FCI;

t. On October 23, 1979, three inmates were interviewed at the FCI;

u. On October 25, 1979, one inmate was interviewed at the FCI;

v. On October 31, 1979, two inmates were interviewed at the FCI;

w. On November 1, 1979, one inmate was interviewed at the FCI;

x. On November 2, 1979, two inmates were interviewed at the FCI;

y. On November 7, 1979, two inmates were interviewed at the FCI;

z. On November 14, 1979, one employee was interviewed at the FCI;

aa. On December 12, 1979, one inmate and a friend of an FCI inmate were interviewed at the FCI;

bb. On January 3, 1980, a friend of an FCI inmate was interviewed at the FCI;

cc. On January 4, 1980, one inmate was interviewed at the FCI;

dd. On January 16, 1980, two inmates were interviewed at the FCI;

ee. On January 17, 1980, one inmate was interviewed at the FCI;

ff. On January 18, 1980, one inmate was interviewed at the FCI;

gg. On February 12, 1980, one inmate was interviewed at the FCI;

hh. On February 20, 1980, one inmate was interviewed at the FBI in Los Angeles;

ii. On March 7, 1980, I interviewed two inmates at the FCI with Assistant United States Attorney Richard E. Drooyan.

7. I have in my possession FBI interview reports from other FBI agents indicating that they interviewed witnesses in this case on the following dates:

- a. October 11, 1979;
- b. November 15, 1979;
- c. February 5, 1980; and
- d. February 11, 1980.

8. I first contacted the United States Attorney's Office regarding the murder of Hall in the first week of September 1979. At that time, I spoke with Assistant United States Attorney John Vandavelde and requested the assignment of an Assistant United States Attorney for the purpose of bringing certain inmate witnesses before a Federal Grand Jury.

9. My first conversation with Assistant United States Attorney Richard E. Drooyan regarding the details of my investigation took place on September 18, 1979. At that time, I related the status of my investigation, reviewed the evidence I had discovered, and requested AUSA Drooyan to commence a grand jury investigation.

10. The federal grand jury investigating this case heard testimony from inmate witnesses on the following dates:

- a. October 18, 1979;
- b. November 15, 1979; and
- c. March 5, 1980.

On each occasion, I travelled to Los Angeles and interviewed these inmate witnesses with Assistant United States Attorney Richard E. Drooyan prior to their grand jury appearances.

11. In order to insure the cooperation of the witnesses who appeared before the grand jury, arrangements had to be made to transfer these inmates to other prisons for security reasons. On numerous occasions, I contacted the Bureau of Prisons to facilitate these transfers.

12. On October 18, 1979 and March 27, 1980, I testified before the Federal Grand Jury investigating this case. On each occasion, I met with Assistant United States Attorney Richard E. Drooyan regarding my investigation and my testimony.

13. During the course of the investigation, numerous items of physical evidence were sent back to the FBI laboratory in Washington, D.C. for analysis, including blood samples, hair samples, finger-prints and handwriting exem-

plars. I have received reports from the FBI laboratory analyzing these items dated November 14, 1979; November 15, 1979; December 10, 1979; and February 15, 1980.

14. Agents of the FBI have conducted interviews with over 100 witnesses in this case, and many of these witnesses were interviewed on two or three occasions. In addition, I have conferred with FCI officials and Assistant United States Attorney Richard E. Drooyan, in person and by telephone, on numerous occasions throughout my investigation.

15. On March 26, 1980, I completed my prosecutive report pertaining to this case. This report, which contained summaries of all interviews and a review of the evidence, was in excess of 200 pages.

16. At no time did I ever delay my investigation to obtain a tactical advantage or for any other reasons. At all times, I conducted this investigation as expeditiously as I could given my caseload and other commitments.

I declare under the penalty of perjury that the foregoing is true and correct.

DATED: This 7th day of July, 1980.

/s/

THOMAS G. MANSFIELD

DECLARATION OF M. RANDALL OPPENHEIMER

I. M. RANDALL OPPENHEIMER, declare and state:

1. I am one of the attorneys for defendant Robert E. Mills. I have personal knowledge of the matters set forth in this declaration.

2. Counsel for Mr. Mills understand that the government intends to call an inmate at trial to testify about a conversation he had with Mr. Mills while both were receiving visits in the visitors' room at FCI, Lompoc. Defendants' investigation discloses that Mr. Mills and the inmate in question were never in the visitors' room at the same time. However, in conversations with employees of the Federal Bureau of Prisons at FCI, Lompoc, subsequent to July 7, 1980, counsel for Mr. Mills were informed that visitor registration cards for inmates (which record dates and times an inmate receives visitors) are routinely destroyed when the inmate to which they relate is transferred to an institution other than Lompoc. The government has been unable to produce the visitor registration cards for the inmate witness in question, and it is counsel's understanding that these cards were routinely destroyed when he was transferred out of Lompoc to a different institution. Counsel are now precluded from using this inmate witness' visitor registration cards to impeach his testimony.

3. Counsel for Mr. Mills were informed by their court appointed expert in forensic criminology subsequent to July 7, 1980 that the blood stains on the physical evidence identified by the government as pertaining to this case (which was not provided to defendants until July 3, 1980) are now too old for all intents and purposes to permit blood typing.

4. I have reviewed statements of witnesses whom the government intends to call at trial in this matter, and have determined the following:

(a) Government interviews of prison employees who will be called to testify at trial were conducted between August 22, 1979, when Thomas Hall was murdered, and September 20, 1979;

(b) Government interviews of inmates who will testify at trial as government witnesses were conducted

between August 22, 1979 and October 18, 1979, with the exception of one inmate who was reinterviewed on November 15, 1979 for the purpose of reviewing a photo display, and one other inmate who indicated in January 1980 that he would cooperate if relocated outside the federal prison system. This inmate subsequently provided his testimony in an interview conducted by the government in March 1980.

5. I have reviewed the list of physical evidence identified to the defendants by the government as pertinent to this case, and have compared that list with the FBI laboratory reports provided to defendants by the government dated November 14, 1979 and November 15, 1979. Based on this comparison, I ascertained that of the 30 items of physical evidence identified by the government, 21 had been analyzed by the FBI laboratory by November 15, 1979.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California on this 17th day of July, 1980.

/s/

M. RANDALL OPPENHEIMER

**SUPPLEMENTAL DECLARATION OF
EDWIN S. SAUL, ESQUIRE
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

I, Edwin S. Saul, declare:

1. I am an attorney licensed to practice law by the State of California. I am admitted to practice before this Court. My office is located at 15760 Ventura Boulevard, Encino, California. If I was called to the stand as a witness, I could testify to the following.

2. Shortly after I was appointed to represent Mr. Pierce, I went to Lompoc to interview prospective witnesses. I found a great deal of resistance based on circumstances that exist with regard to prison crimes. Numerous inmates told me that I would basically find the rest of the inmates divided into two different and distinct groups. A small group of people after every such incident would scurry around the prison trying to find out from others as much as they could about the incident so that they could go to the government and, true or not, tell the Government what that inmate thought the Government might want to hear in exchange for something, a better prison job, a letter to the Parole Commission, a transfer to a different prison or a camp, or whatever. From what I was told it would appear that the Government would have to be very careful to make sure that the witnesses they were calling were indeed percipient to the events that they were willing to testify to. I was told that the majority of the inmates would simply not want to get involved. Most seem to sincerely believe that the prison officials would retaliate in some way if they agreed to testify for the defense. To a man, each and every inmate I spoke with would, at first, express regret but decline to testify. Some have changed their minds, and, as indicated *infra*, some have changed their minds back again (see this Declaration, sub paragraphs 11A through 11E, *infra*).

3. Another major problem in trying to get inmates to testify on behalf of the defense relates to the fact that victim Hall was apparently very heavily into drug dealing within the prison walls. The discovery material indicates that many of the Government's inmate witnesses will testify to

their participation in drug transactions which are in violation of State and Federal laws and also in violation of prison rules. These inmates obviously do not fear discipline or prosecution since, in most cases, the Government has actually agreed to help these inmates in some way and would obviously not be gaining their participation if the inmates had a worry about either discipline or prosecution. Several inmates who had information which I would want to elicit at the Trial would only agree to testify if I could assure them that there would be no discipline imposed by the prison based on what they would admit in their testimony. Since I could obviously not do this, these individuals would not be witnesses for the defense. Similarly, I will not be in a position to call to the stand an inmate who revealed to me in confidence that he had given Hall a weapon (subsequently found under Mellon's mattress) in response to a request from Hall which explicitly pointed out who and what Hall was afraid of.

4. My efforts in even finding prospective witnesses was hampered by the fact that Mr. Pierce had only been at Lompoc since May of 1979. Most of the people he knew by only a first name, a last name, or, more prevalent yet, a nickname. It seems that a great number of people are known within the prison by nicknames. In a meeting that I had with Lompoc F.C.I. Paralegal Officer, Gary Roberts, I inquired about these nicknames. Mr. Roberts conceded that many, if not most, of the inmates were known by a nickname, but admitted that the prison kept no record of these names. As a matter of fact, Mr. Roberts asked me if I would give him a list of the nicknames I was eventually successful in tracking down since it was quite common for the prison to be asked about this information.

5. Among the nicknames that I tried to locate were: Little Charlie, Henry's Kid, Hat, Dollars, Crow Dog, Buzzard, Indian, Droopy, The Hippie, Sluggo, Ole, Mouse, Cowboy, Fast Freddie and Weasel. In many instances I had a first name and a unit like "Gary from J Unit", or a last name and a unit like "Chavetz in H Unit". In most cases I had only phonetic spellings. In talking to inmates to attempt to locate these individuals I was often told something: "Yeah, I

vaguely remember a guy named "Hat", but it's been so long I can't remember who that was." (Not a direct quote); or "Yeah, I remember a John in F Unit but I can't remember his last name now, I knew it then but that was almost a year ago." (Not a direct quote.)

6. In the first instance, although Mr. Pierce told me that he did make an effort to remember his whereabouts on August 22, 1979, his memory had been faded by the experience of being in Isolation for seven or eight straight months. He had made various notes of his recollections, but those were in his property which he has still not been able to obtain. As a secondary proposition, and perhaps even more important, Mr. Pierce had no way of knowing until I spoke with him in late May or early June, 1980, that it would be important for him to account for his time on August 21, 1979, or any day other than August 22nd, and seems to be finding it difficult, if not imposible, to reconstruct other events and alleged meetings.

7. Mr. Pierce told me that he asked for a lawyer almost from the first instant when he was questioned and continued to ask for a lawyer as frequently as he could during the seven or eight months that followed. Being incarcerated, of course, he was not in a position to earn money to hire his own lawyer. The possibility of him doing some leg work on his own was completely taken away by his confinement in isolation with no ability to track people down, learn their true names, and give them some reason to keep in the memory events which at that point would only have been hours or days old. From my conversations with Mr. Pierce I believe that I would be able to establish that he was not at places that the Government claims he was at the times they claim he was there through competent, believable testimony which I am precluded from being able to introduce because I did not have occasion to start these efforts prior to May 22, 1980, the date upon which I was appointed.

8. Mr. Pierce told me that he believes that he ran into at least forty different inmates in the mess hall alone. As of this writing, I can count only five to seven people who feel they can testify to this and at least one is a man who I came upon through my own efforts quite by accident. Similarly,

Mr. Pierce advised me that there were maybe fifteen to twenty-five people who could have helped explain away certain physical evidence, but as of this time I have only between three and five who will discuss actually testifying.

9. Mr. Pierce, not having his request for the appointment of a lawyer honored, tried self-help. He made efforts to act in propria persona but was hindered by the sub-standard law library available to those in Isolation. The inmates in the general population have, by contrast, a respectable library and much easier access to it. Moreover, Mr. Pierce was hindered by the prison apparently imposing restrictions on his conduct which were not even imposed on other inmates in "I" Unit. Finally, whatever benefit might have resulted from Mr. Pierce's efforts over a period of some five to six months has been swept away as a result of the prison system's failure to restore him to his property.

10. As has been previously pointed out, if an attorney had been appointed for Mr. Pierce at the time he first requested one that attorney could have done many things to assist in the preservation of evidence and the preparation of a defense. The examples are numerous. The footprints on the third floor of "E" Unit, near where the incident occurred, were never measured. No effort was made to determine the size of the shoe or shoes which might have made these prints. The only attempt to preserve the evidence was a very unprofessional effort with an unsophisticated Polaroid Camera. Similarly, only poor quality photographs taken by someone who had not the slightest thought of assisting the defense nor any knowledge of defendant's explanation remain as evidence of what appear to be finger impressions on Mr. Pierce's bicep.

11. Perhaps the greatest problem created by the long, as yet unexplained, preindictment delay has been the defection of witnesses caused by concern over the length of time between event and trial. Most of these defections first came to my attention when I visited Lompoc on July 9, 1980. Indeed, I fear that there may be more of this between this date and the trial, but here is a sample of what exists as of the moment.

a. Mr. Diamond and I first visited Lompoc on or about June 13, 1980. As a result of our efforts, I learned of an inmate who was going to testify that he had a conversation with Guard Clifford Wilson in which Wilson, in the presence of another inmate, admitted that Wilson couldn't be sure who it was he saw descending the stairs on August 22, 1979. On July 9, 1980, this inmate told me that after he was last interviewed by a defense attorney he was forced to speak with the F.B.I. He was told that if his testimony was untrue he would be prosecuted for perjury. He then told me that he was going to have to decline to testify on behalf of the defense in regard to his meeting with Wilson. It was my impression that he still sincerely believed his meeting with Wilson was just as he had first related, but that so much time had transpired before he was first interviewed about the event, particularly in the face of a possible perjury charge, that he could not risk telling the story under oath. It is, of course, not uncommon to run into a very responsible prospective witness who sincerely believes an event happened in a particular way but is unwilling to, for example, make an identification from recollection, under oath.

b. Another inmate was going to testify that he had had a conversation with Gary Mellon on August 22, 1979 in which Mellon indicated that defendant Mills had been unwilling to help protect Mellon's friend Gary Hall from some black inmates who were threatening Hall's life as a result of a financial transaction that arose out of a large drug deal. Mellon told this inmate that if any harm came to Hall, Mellon would see to it that Mills went down with him. On July 9, 1980 this inmate told me that he was no longer willing to testify. We discussed his reasons. He told me that these events all happened a long time ago. I believe that he will now not be a witness because he is concerned about the possible questions that might arise as to the accuracy of his recollection, particularly the details which he quite candidly admits he cannot recall.

c. The efforts of Mr. Diamond and I turned up an inmate who was going to testify that Mr. Hall had told him several times before he was killed that Hall was having problems with some black inmates because of a dope deal, and that Hall had expressed fear for his life.

The last of these conversations occurred on either August 21st or August 22nd, 1979. On or about July 10, 1980, I learned that this inmate had also determined that he would definitely not testify. Although my own personal conversation with the prospective witness was not as extensive as my contact with the others, I assume that this witness is also very much concerned with the amount of time which has transpired. In one conversation he told me that it was very difficult to try to remember the details about events which took place so long ago. One inmate asked me why he was not contacted sooner, and expressed the feeling that he could have been of much more help if so much time had not gone by.

d. One witness was in the Mess Hall with the defendants at the time the Government alleged that they were elsewhere. I originally thought that this witness was going to testify, but on July 9, 1980 I learned that he would not. My impression is that he was still 90% certain of his recollection, but, particularly in view of admonitions as to perjury, would not repeat these recollections under oath.

e. Another inmate told me that he was outside the "E" Unit from about 4:45 P.M. to 5:15 P.M. on August 22, 1979. He said that he was watching the door and would have noticed the defendants, or either of them, if they left the unit that night; but that he was certain that he did not see either of them. He also indicated that one Government witness who claims to have been an eye-witness was not in a position to have personally perceived what he claims. This witness has also declined to testify. This witness also asked why he wasn't contacted sooner. On one occasion he asked me whether I thought that the prison officials or the F.B.I. would believe he was being truthful. I noted that there was in fact a great deal of time transpiring between the events and the time he was first asked about these events. I could not truthfully answer his question in the affirmative.

12. Efforts to accumulate information about the March, 1979 incident in which Hall's cell was burned down were almost totally thwarted by the time problem. Many inmates told me that they had at one time been aware of informa-

tion which might have been useful, but that they were now not really sure of these facts. Almost all of the prospective witnesses who voiced concern about the delay and the effect that it might have had on their recollection have categorically refused to testify. I have personally made the decision that I cannot afford to use a witness who would certainly state on cross-examination, and perhaps on direct, that he can't really be sure of what he has testified to because such a long period of time transpired before he was asked to try to recall these events with specificity. As outlined above, Paragraphs 1 through 3, *infra*, there are a number of general problems in trying to get inmates to come forth and even talk to defense attorneys, let alone testify. In this case these problems have been magnified one hundred fold by the time delay.

13. As of this moment there are still some individuals who may yet decline to testify because of reasons which are associated with the delay of which the defendants complain. In my own professional opinion I can state with sincerity that if I had been appointed to represent Mr. Pierce at the time he first requested an attorney, instead of having first been appointed on May 22, 1980 the chance of being able to establish reasonable doubt would have been significantly greater. The problems relating to the delay could easily make the difference between winning and losing this case.

I declared under penalty of perjury that the foregoing is true and correct.

Executed at Van Nuys, California on July 17, 1980.

/s/

EDWIN S. SAUL

**GOVERNMENT MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
MOTIONS TO DISMISS INDICTMENT**

I

BACKGROUND AND FACTS

On August 22, 1979, Thomas Hall was brutally murdered at the Federal Correctional Institution (FCI) at Lompoc, California. Immediately following the murder, Special Agent (SA) Thomas Mansfield of the Federal Bureau of Investigation (FBI) commenced his investigation by reviewing the situation with prison officials, examining defendants Mills and Pierce, gathering and preserving physical evidence and interviewing witnesses. In the months following the murder, SA Mansfield and other agents of the FBI conducted interviews with over 100 witnesses. During this period, the United States Attorney's Office conducted a grand jury investigation into the murder, and the FBI laboratory analyzed all of the physical evidence which had been obtained following the murder. SA Mansfield and Assistant United States Attorney (AUSA) Richard E. Drooyan continually reviewed the status of the matter and, on March 27, 1980, just over seven months after Hall's murder, defendants Mills and Pierce were indicted by a Federal Grand jury. [See Declarations of Thomas Mansfield and Richard E. Drooyan submitted herewith]. The Government conducted a thorough and expeditious investigation into the murder of Hall and there were no unwarranted or unusual delays in presenting the matter to the grand jury for indictment.

II

**DEFENDANTS' SIXTH AMENDMENT RIGHTS TO
A SPEEDY TRIAL WERE NOT VIOLATED.**

A defendant's right to a speedy trial attaches once he has been accused, whether by arrest or the filing of formal charges. *United States v. Lovasco*, 431 U.S. 783, 789 (1977); *United States v. Marion*, 404 U.S. 307, 313 (1971). In this case, the defendants were accused when the grand jury returned an indictment on March 27, 1980. Their claim

that their speedy trial rights attached when they were placed in the Administrative Detention Unit is simply without merit.

While defendants are not unmindful of the Ninth Circuit's decision in *United States v. Clardy*, 540 F.2d 438 (9th Cir.), *cert. denied*, 429 U.S. 963 (1979) [Defendants' Memorandum of Points and Authorities, p. 9], they have chosen to disregard its import and to ignore the numerous other cases similarly decided. In *Clardy*, the Ninth Circuit specifically rejected defendants' claim that they "were *de facto* arrested by being placed in segregated confinement after the attack [inside the prison at McNeil Island]" and therefore, held that the Sixth Amendment right to a speedy trial did not encompass the period prior to their indictment by a Federal Grand Jury. 540 F.2d at 441. *Clardy* is consistent with every other case in which defendants have claimed violations of their Sixth Amendment right to a speedy trial as a result of administrative segregation by prison officials. In each case, the Courts explicitly held that administrative segregation is not an arrest for the purposes of the Sixth Amendment's guarantees. *United States v. Blevins*, 593 F.2d 646, 647 (5th Cir. 1979); *United States v. Manetta*, 551 F.2d 1352, 1354 (5th Cir. 1977); *United States v. Duke*, 527 F.2d 386 (5th Cir.), *cert. denied*, 426 U.S. 952 (1976); *United States v. Smith*, 464 F.2d 194 (10th Cir. 1972), *cert. denied*, 409 U.S. 1066 (1973).

Defendants' reliance upon *Cervantes v. Walker*, 598 F.2d 424 (9th Cir. 1978) is misplaced. The issue in *Cervantes* was what constitutes a "custodial interrogation" in prison for the purpose of requiring *Miranda* warnings. In holding that such warnings were not required in the context of that case, the Ninth Circuit did not discuss or even cite *Clardy* nor did it analyze Sixth Amendment rights in a prison setting. In contrast, the Court in *Clardy* explicitly analyzed the reasons why, in light of the Supreme Court's decision in *United States v. Marion*, *supra*, that a defendant's Sixth Amendment rights are not triggered by administrative segregation. 540 F.2d at 441.

In this case, defendants' Sixth Amendment right to a speedy trial attached when the indictment was returned on

March 27, 1980. *United States v. Clardy*, *supra*, 540 F.2d at 441; *United States v. Manetta*, *supra*, 551 F.2d at 1354. Defendants do not claim that there has been any violation of their Sixth Amendment rights to a speedy trial since the date of the indictment, and thus there is no need to make the analysis required by *Barker v. Wingo*, 407 U.S. 514 (1972). See, *United States v. Blevins*, *supra*.

III

THE DEFENDANTS' FIFTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW WERE NOT VIOLATED.

Whether an impermissible pre-indictment delay is sufficient to warrant a dismissal of criminal charges arises under the Due Process Clause of the Fifth Amendment. *United States v. Lovasco*, *supra*; *United States v. Kail*, 612 F.2d 443 (9th Cir. 1979). To establish a due process violation requires proof of an unwarranted delay by the Government resulting in actual prejudice to the defendant. In *United States v. Lovasco*, *supra*, 431 U.S. at 790, the Supreme Court noted that:

"Proof of prejudice is generally a necessary but not sufficient element of a due process claim and ... the due process inquiry must consider reasons for delay as well as the prejudice to the accused."

Stated otherwise, "[p]roof of prejudice alone is not sufficient for dismissal of an indictment without consideration of the reasons for the delay." *United States v. Tempesta*, 587 F.2d 931, 933 (8th Cir. 1978).

The test formulated by the Ninth Circuit for determining if a defendant's Fifth Amendment rights have been violated by a pre-indictment delay is set forth in *United States v. Kail*, *supra*, 612 F.2d at 445 as follows:

"The due process test for impermissible pre-indictment delay requires a delicate balancing of the circumstances in each case. Primarily, the court must compare the gravity of the actual prejudice to the reasons for the delay."

Accord, *Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978). The factors to be balanced are the actual prejudice to the defendant, the length of the delay, and the reasons for the delay. *United States v. Mays*, 549 F.2d 670, 677 (9th

Cir. 1977); *United States v. West* 607 F.2d 300 (9th Cir. 1979).

A. DEFENDANTS HAVE FAILED TO SHOW ACTUAL PREJUDICE TO THEIR DEFENSE.

A defendant must have specific proof of actual prejudice in order to warrant a dismissal of the indictment. In *United States v. West*, *supra*, 607 F.2d at 304, the Ninth Circuit stated that "[t]he crucial element in the due process test established by *Mays* is the finding of actual prejudice to the defendants. The satisfaction of this element is a prerequisite to finding a due process violation." Thus, a defendant "must show not only the loss of [a] witness and/or evidence but also demonstrate how the loss is prejudicial to him." *United States v. Mays*, *supra*, 549 F.2d at 677. General allegations that witnesses' memories have faded or that witnesses are no longer available is insufficient to establish actual prejudice. *United States v. Kail*, *supra*; *United States v. West*, *supra*; *United States v. Ramos*, 586 F.2d 1078 (5th Cir. 1978).

Defendants Mills and Pierce have failed to make the required showing of actual prejudice in this case. The facts relied upon by Mills are contained in his Declaration submitted in support of the motion. For nine pages Mills relates the conditions of his confinement in the Administrative Detention Unit and the history of his prison disciplinary hearings. Nowhere does he claim, or even suggest that he is now prejudiced by the alleged delay. Mills does not even claim that witnesses are no longer available or that they are unable to recall the events surrounding Hall's murder. Mills' Declaration is simply a complaint about the conditions of his confinement. There is nothing to support a claim of actual prejudice resulting from any delay by the United States Attorney's Office or the FBI in presenting the case for indictment.

Pierce's claims, which are apparently based upon the Declaration of his attorney Edwin S. Saul [submitted with Pierce's separate motion to dismiss filed on June 30, 1980], are similarly devoid of any factual basis. Except for Mr. Saul's claim that certain unidentified witnesses will never be found, he alleges no facts which support a showing of

prejudice caused by the alleged delay. Even this claim lacks the specificity required to show actual prejudice; it does not identify the witnesses or nor does it indicate what they would testify to. Mr. Saul's remaining allegations regarding the questions which "would have been important" to ask at the autopsy and the preservation of the "fingerprint" impression on Pierce's arms not only are lacking in specificity and based upon speculation, but are unrelated to the alleged delay. What happened during the investigation immediately following the murder does not establish that there was prejudice *as a result* of any delay between the murder and the indictment.

The arguments fashioned by Mills' and Pierce's attorneys have no factual support whatsoever. They make general allegations that witnesses are unable to remember details, that critical witnesses have been transferred, that "various documents of potentially critical importance" have been lost, and that items of physical evidence "may have" a "benign explanation." [Defendants' Memorandum, pp. 1618]. These claims are unsupported by any specificity. No witnesses are identified as being unavailable or unable to recall the events surrounding the murder, no documents except for post orders are identified as being lost, and their claims regarding the the physical items are speculative at best. Moreover, the claims of prejudice relating to loss of documents and physical evidence are again based upon what occurred at or near the time of the murder, and not upon the alleged delay by the Government in seeking an indictment.

The instant case is factually very similar to *United States v. Blevins, supra*, which involved a seven month delay in a prison assault case. As a result of the pre-indictment delay, the defendant alleged that "his witnesses' memories faded and that they were unable to relate what actually happened," and that "because of his confinement in a segregation unit, potential witnesses in the general population of the prison were unavailable to him." In denying the defendant's motion to dismiss for pre-indictment delay, the Fifth Circuit held that his general allegations were insufficient to establish actual prejudice. 593 F.2d at 647.

**B. THERE WAS NO UNREASONABLE DELAY IN
PRESENTING THIS CASE TO THE FEDERAL
GRAND JURY FOR INDICTMENT.**

Once a defendant has met his burden of establishing actual prejudice due to "an unusually lengthy government-caused delay," the inquiry focuses upon the Government's reason for the delay. *United States v. Mays, supra*, 549 F.2d at 678. Regardless of "the degree of actual prejudice, a dismissal is not warranted absent 'some culpability on the government's part, either in the form of intentional misconduct or negligence.'" *United States v. Mays, supra*.

When the delay is caused by the Government's need to investigate crime and develop evidence, a dismissal for pre-indictment delay is unwarranted. *United States v. Lovasco, supra*, 431 U.S. at 795; *United States v. Robertson*, 588 F.2d 575, 577 (8th Cir. 1978). The Government is under no duty to file charges "as soon as probable cause exists" or when there is "enough evidence to establish guilt beyond a reasonable doubt." *United States v. Lovasco, supra*; *United States v. Ramos-Algerin*, 584 F.2d 562 (1st Cir. 1978); *United States v. Radmall*, 591 F.2d 548 (10th Cir. 1978). As long as the delay is for the purpose of investigating the case and not "solely to gain tactical advantage of the accused" there is no Due Process violation. *United States v. Lovasco, supra*.

Preliminarily, it should be noted that any delay in this case was minimal. The Government conducted an exhaustive investigation of a very serious crime. Given the nature of the crime and the nature of the investigation, a seven month period between the murder and the indictment was not at all unreasonable. In other cases involving longer periods, similar motions have been denied. *E.g., United States v. Kail, supra*, (two years, three months); *United States v. Dakow*, 453 F.2d 1328 (3d Cir.), *cert. denied*, 406 U.S. 945 (1972) (55 months from initiation of SEC administrative proceedings and 22 months from referral of case to United States Attorney by SEC); *United States v. Ferrara*, 459 F.2d 868 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972); (slightly less than four years).

As set forth in the Declarations of Thomas Mansfield and Richard E. Drooyan submitted herewith, the Government immediately commenced to investigate the murder of Hall and continued with its investigation up through the return of the indictment by the Grand Jury on March 27, 1980. The investigation was continuous and evidence was obtained throughout the period of the investigation.

Defendants' claim that the Government had enough evidence by October 1979 [Defendant's Memorandum p. 13] ignores the realities of the Government's investigation and the problems inherent in prosecuting a serious crime. Although a substantial number of interviews had been completed by the middle of November 1979, additional evidence was obtained during the remainder of the investigation. When certain witnesses agreed to cooperate and provide additional information in March 1979, the Government promptly sought an indictment.

The Government is entitled to follow any additional leads and obtain all of the available evidence before seeking an indictment. Delay for this reasons does not violate the Due Process Clause. As stated by the Supreme Court in *United States v. Lovasco*, *supra*, 431 U.S. at 896:

"In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely to gain tactical advantage over the accused," United States v. Marion, supra, 404 U.S., at 324, precisely because investigative delay is not so one-sided. Rather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictment until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer actions for these reasons would subordinate the goal of 'orderly expedition' to that of 'mere speed,' Smith v. United States, 360 U.S. 1, 10 (1959). This the Due Process Clause does not require." 431 U.S. at 790-96. [Emphasis added; citations omitted].

Accord, Arnold v. McCarthy, supra, 506 F.2d at 1385 ("the prosecution fairly exercised its prosecutorial discretion to delay indictment until sufficient evidence existed to

obtain a conviction."); *United States v. Palan*, 571 F.2d 497 (9th Cir. 1978) ("due process does not prevent the prosecutor from delaying submission to the grand jury in order to acquire additional probative evidence.").

In this instant case, the government conducted a continuous investigation from the date of Hall's murder until the return of the indictment. The actions on the part of the United States Attorney and the FBI were for the purpose of building its case and not to gain a tactical advantage or prejudice the defendants.

IV

DEFENDANT DID NOT HAVE A SIXTH AMENDMENT RIGHT TO COUNSEL WHEN THEY WERE EXAMINED BY THE FBI.

For the purposes of defendants' motion to suppress evidence, the issue in this case is whether defendants' right to counsel under the Sixth Amendment attached when they were examined by FBI agents and prison officials during the evening of August 22, 1979 following the murder of Hall. At that time, evidence consisting of defendants' clothes and a sample of Mills' blood was obtained. In addition, agents observed certain marks on each defendant and saw Mills remove a spot of blood from his hand.¹

In *Kirby v. Illinois*, 406 U.S. 682 (1971), the Supreme Court identified when the right to counsel attaches as follows:

"[I]t has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary proceedings have been initiated against him."

¹ With the exception of clothes that were obtained from the defendants' cells at a later date, no other physical evidence taken from them will be introduced at trial. In addition, the Government does not have any statements which were made by defendants to agents or prison officials after they were first examined by the agents. Accordingly, there is no issue under *Massiah v. United States*, 377 U.S. 201 (1964).

The initiation of adversary judicial proceedings requires more than just an arrest. *United States v. Derring*, 592 F.2d 1003 (8th Cir. 1973); *Carver v. Alabama*, 577 F.2d 1188 (5th Cir. 1978). It requires some formal action such as "formal charges, preliminary hearing, indictment, information or arraignment." *Kirby v. Illinois*, *supra*, 406 U.S. 689. In this case, adversary judicial proceedings were initiated when the indictment was returned on March 27, 1980.

Defendants' attempt to move their right to counsel to August 22, 1979 is based upon language from *Kirby* to the effect that the right attaches when "the adverse positions of government and defendant[s] had solidified." [Defendants' Memorandum, p. 21]. In quoting this passage out of context, defendants ignore the remainder of the sentence in which the Supreme Court indicated that "adverse positions" solidify *only* when "the government has committed itself to prosecute..." *Kirby v. Illinois*, *supra*, 406 U.S. at 689. In this case, the United States Attorney's Office was not even notified of the murder until early September 1979. Moreover, a prosecutor was not assigned to supervise the investigation until the middle of September 1979. Thus, there was certainly no commitment to prosecute when defendants were initially examined by the FBI.

Defendants' reliance upon Administrative Detention Orders as functional equivalents of arrest warrants is misplaced. As noted earlier, defendants' confinement in the segregation unit did not even constitute an arrest for purpose of the speedy trial guarantees of the Sixth Amendment. See Section II, *supra*. *A fortiori* it did not constitute the initiation of formal judicial proceedings.

Defendants' Sixth Amendment claim is based upon a misperception of the relationship between the Bureau of Prisons on the one hand and the United States Attorney and the FBI on the other hand. While FCI officials may assist the FBI and the United States Attorney in the investigation of crimes in the prison, their primary responsibility is to maintain order and discipline among the inmate population. Mills and Pierce were placed in segregation for this

purpose, not for the purpose of assisting the FBI or hindering their ability to prepare a defense. As noted by the Fifth Circuit in *United States v. Duke*, *supra*, 527 F.2d at 390:

"Used as a method of disciplining or investigating inmates who break prison regulations, of protecting certain inmates from the general population, and of providing a general cooling-down period for inmates involved in events that could disrupt the general population, administrative segregation accompanying the breach of prison regulations is in no way related to or dependent on prosecution by the federal government of an inmate for that same offense as a violation of federal criminal law." (Emphasis added).

The Court further observed "that administrative segregation of a prisoner is an internal disciplinary measure that is totally independent from the criminal process of arrest and prosecution."

SA Mansfield examined the defendants and obtained various items of evidence on August 22 for the purpose of investigating the murder of Hall. When he arrived at the FCI, he immediately commenced an investigation to determine who murdered Hall and obtain relevant evidence. His investigation was not converted into the "functional equivalent" of formal charges by virtue of his discovery of evidence, including the defendants' physical conditions and their clothes, which focused suspicion on the defendants. At the time of the examination, Mills and Pierce did not have a right to counsel because it simply does not attach to a "routine police investigation," whether or not a suspect is in custody. *Kirby v. Illinois*, 406 U.S. at 690.

Even if the right to counsel attached during the evening of August 22—and the Government vigorously contends that it does not—defendants were not entitled to counsel when they were examined by the agents and their clothes were taken. In *United States v. Wade*, 388 U.S. 218 (1966), the Supreme Court held that counsel was required at a post-accusatory line-up. In reaching this result, the Court specifically distinguished "various other preparatory steps [in the gathering of the prosecution's evidence], such as systematized or scientific analyzing of the accused's finger-

prints, blood sample, clothing, hair and the like." 388 U.S. at 228. A physical examination is fundamentally unlike a line-up or a show-up, which is a confrontation between the accused and his accuser, *United States v. Wade, supra*; *Kirby v. Illinois, supra*, 406 U.S. at 695, and there is no right to the presence of counsel at such an examination.

V

CONCLUSION

For the reasons set forth herein, defendant's motions to dismiss and to exclude evidence should be denied.

GOVERNMENT OBJECTIONS TO PROPOSED ORDER DISMISSING INDICTMENT

I

SUMMARY OF RULINGS

1. The Government objects to paragraph 1 because a portion of the delay was attributable to defendants' requests for continuances.

2. The Government does not object to the proposed language in paragraph 2.

3. The Government objects to paragraph 3 because the court specifically relied upon the grounds set forth in paragraphs 1 and 2 in dismissing the indictment, and decided not to add this additional basis. Moreover, there is no evidence in the record that the defendants were held "incommunicado" or that they were not permitted to retain counsel for the purposes of interviewing witnesses and preserving evidence.

II

FACTUAL BACKGROUND

1. The Government objects to paragraph 1 because there is no evidence that the Government consistently denied defendants' request for counsel or continued the interrogation. Mills refused to make a statement in the absence of counsel [¶ 2] and no statements were taken from either of the defendants [Government's Opposition, p. 13].

2. The Government objects to paragraph 2 because it indicates that defendants were held in solitary confinement in the strip cells during the entire pre-indictment period. This is false and contradicted by Mills' own declaration; defendants were transferred to a regular cell in the detention unit on the morning following the murder [¶ 13]. Moreover, there is no evidence as to what the Bureau of Prisons' policy would have required within the first few months of their ADU commitment.

3. The Government objects to paragraph 3 because defendants were not reminded constantly by prison employees that they were under suspicion for the murder of Thomas Hall. The Government also objects to this paragraph

because there is no showing on behalf of defendant Pierce as to any of the matters set forth therein.

4. The Government objects to paragraph 4 because there is no showing on behalf of defendant Pierce as to any of the matters set forth therein. With respect to defendant Mills, there is no evidence to support his claim that the Government was preparing an indictment against him and, indeed, that finding is specifically contradicted by his own declaration [¶ 5, lines 22-25].

5. The Government objects to paragraph 5 because there is no evidence that the defendants requested or were forbidden to contact other inmates in the prison or potential non-inmate witnesses if necessary for the preparation of their defenses.

6. The Government objects to paragraph 6 because there is no showing that the defendants were in fact "stigmatized"; that the physical well-being of the defendants was in fact "threatened"; or that the defendants were ever threatened by any inmates. Moreover, there is no evidence as to what the inmates in the general population thought about the defendants having been placed in ADU.

7. The Government objects to paragraph 7 because there is no showing that the defendants suffered from "acute emotional and mental strains"; that the defendants were forced to live "daily with the fear of reprisal", or that the defendants were "wholly unable to begin preparing a defense." There is no evidence that defendants ever indicated that they feared reprisals or were actually threatened. Moreover, they were not "wholly unble" to prepare a defense since they were not incommunicado, could have contacted a lawyer and had access to the law library.

8. The Government objects to paragraph 8 because the Government does not concede this finding.

9. The Government objects to paragraph 9 because the Government conducted a continuous and expeditious investigation. Moreover, there was no evidence regarding the circumstances under which the government decided to seek blood and hair samples from the defendants.

10. The Government objects to paragraph 10 because there is no showing that the Government failed to preserve

documents "critical" to the defense effort, that there was any loss or alteration of physical evidence, that physical evidence essential to corroborate independent testimony was lost or altered, or that there was an irrevocable loss of inmate witnesses.

III

LEGAL CONCLUSION

1. The Government objects to paragraph 1 because there was no finding by the Court that the "conditions of confinement" constituted an "arrest."

2. The Government does not object to the language used in paragraph 2.

3. The Government objects to paragraph 3 because the Government had not substantially completed its investigation by October 1979.

4. The Government objects to paragraph 4 because the Court did not use the right to counsel as an independent basis for dismissing the indictment. Moreover, the Government did not delay the commencement of adversary proceedings for eight months under the "guise of administrative detention."

5. The Government objects to paragraph 5 because the defendants were not "incommunicado," nor were they forbidden from contacting potential witnesses or seeking to retain counsel.

EXCERPTS OF TRANSCRIPT OF HEARING ON MOTION
TO DISMISS INDICTMENT

[48] LOS ANGELES, CALIFORNIA; MONDAY,
JULY 21, 1980; 10:00 A.M.

THE CLERK: Item 2, Criminal 80-278, United States v. Mills and Pierce. Hearing re motion to dismiss or in the alternative to exclude evidence.

MR. SAUL: Good morning, your Honor, Mr. Pierce is present, represented by Edwin S. Saul.

THE COURT: Good morning.

MR. DIAMOND: Charles Diamond and Randall Oppenheimer on behalf of Mr. Mills, who is present in court.

THE COURT: You all may sit down.

Mr. Drooyan, why were these men placed in the hold on the night of the murder?

MR. DROOYAN: Because following the prison investigation on that night, which included the interview of one of the Government's main witnesses, the examinations of the defendants, the prison officials concluded that there was evidence linking them to the murder.

THE COURT: They believed that they had committed the murder. They believed it most likely that they had committed the murder.

MR. DROOYAN: Certainly—I have not discussed the matter with the prison officials who made [49] the determination. There is no question that they believed there was certainly evidence to link them to the murder.

THE COURT: You know, I hope the prison isn't going to put a prisoner down in that hole, which I have seen, without substantially good reason, and giving credit to the prison people they must have strongly suspected that these men were the perpetrators of the murder. Isn't that so?

MR. DROOYAN: I certainly assume that, your Honor.

THE COURT: And they kept them there for what; seven or eight months?

MR. DROOYAN: Seven months, your Honor.

THE COURT: Seven months. And after the first couple of weeks or so, they were jolly well convinced that in all probability these men had committed the murder.

MR. DROOYAN: Your Honor, there were hearings in the middle of September—

THE COURT: Yes.

MR. DROOYAN: —in which they made determinations.

THE COURT: And they kept them there. If they had been on the street and the government had had that [50] substantial suspicion, they would have been arrested long since, wouldn't they?

MR. DROOYAN: Yes, your Honor.

THE COURT: And brought before a magistrate. And given an attorney, so that the attorney could represent their interests and perhaps begin an investigation. Isn't that so?

MR. DROOYAN: Yes, your Honor.

THE COURT: And that didn't happen with these men. They were, in effect, incommunicado for seven months even though they had sought an attorney—the assistance of an attorney.

MR. DROOYAN: They were not incommunicado, your Honor.

THE COURT: Tell me wherein they were not.

MR. DROOYAN: They had visits. They did have opportunity to communicate with people on the outside. They had contact with other prisoners.

THE COURT: Did they? How?

MR. DROOYAN: Well, within the I Unit, the isolation unit.

THE COURT: All right.

MR. DROOYAN: They did have access to the law library, your Honor.

THE COURT: If they had wanted to cause the [51] fellow prisoners that they think might be witnesses to—if they wanted to interview them or have somebody interview them and preserve their recollections, how could they do that?

MR. DROOYAN: Well, your Honor, they did have an opportunity to present witnesses on their own behalf to the

prison officials. They declined to take that opportunity, and to say that they didn't have the opportunity to talk to them or that the other prisoners were afraid I think begs the question.

They certainly had that opportunity to call the witnesses in their behalf and to have them present whatever favorable evidence there was in their behalf.

THE COURT: These men were strongly suspected of murder; otherwise they would never have been put in the hole, and a very able gentleman from the FBI wouldn't be spending six months investigating.

Why in heaven's name were they not given an attorney so an attorney could start an investigation for them before the inmates were spread all over the country or released?

You were on that case by September.

MR. DROOYAN: Yes, your Honor.

THE COURT: Didn't it occur to you that the focus of suspicion was on these men and they really ought [52] to have counsel?

MR. DROOYAN: It certainly occurred to me that the focus of suspicion was on these individuals, your Honor. I had no communication with the prison officials with respect to the status of these men until March.

THE COURT: You knew what the status was, did you not?

MR. DROOYAN: No, I did not, your Honor. This is my own fault. This is the first type of case like this I have handled. It really never occurred to me to check where these prisoners were until I went up to the prison in March.

THE COURT: I am not disposed to excoriate you, Mr. Drooyan, but the United States government was involved, and for purposes of this case I don't distinguish between the Department of Justice or the Bureau of Prisons. The fact of it is that these men were—I said incommunicado—semi-incommunicado for seven months while the government at its leisure was making a detailed investigation which on their behalf no one had even any opportunity to begin. Isn't that so?

MR. DROOYAN: Your Honor, it is true that the government was conducting an investigation during this period.

THE COURT: Yes.

[53] MR. DROOYAN: It is true that counsel was not appointed for these individuals. It is the government's position that appointed counsel is not required. It is not true that they did not have an opportunity through their own relatives and friends who were visiting them on regular occasions to seek outside counsel. Maybe that is an unrealistic view on my part, but they were not denied access to counsel in the sense that I think the Court is talking about.

THE COURT: They weren't? According to their affidavits, which are uncontradicted, they asked for counsel every opportunity they had.

MR. DROOYAN: And the prison officials did not appoint counsel, that is true.

THE COURT: They certainly didn't and denied their request.

MR. DROOYAN: What I am saying, your Honor, is they should not have gone through the prison officials when it was obvious that that wasn't going to get them what they wanted. They had access to people on the outside. That is what I am saying. If they wanted counsel, if they were serious about asserting that right, they could have communicated it to the people visiting them and done it that route. It was obvious, and I agree that the prison officials were unresponsive to their [54] requests.

THE COURT: They certainly were.

MR. DROOYAN: But once they are unresponsive, there are other avenues. They weren't in such incommunicado that they couldn't possibly communicate with anybody on the outside. That is not the way it happened.

THE COURT: So you say that even though the government would not cause counsel to be appointed for them they had a right to go—if a girlfriend were to visit them or a next door neighbor, they could say, "Go get me a lawyer," and somehow that person could go try to find a lawyer?

MR. DROOYAN: Your Honor—

THE COURT: Whether there is money to pay for it is another matter.

MR. DROOYAN: Your Honor, what I am saying is that if communications were made to people on the outside, I suspect a court would have appointed a lawyer and there

would have been counsel in this. But what they did was, having their requests denied or no response from the Bureau of Prisons, they didn't choose to pursue any other avenue to do it. Maybe in hindsight the Bureau of Prisons should have been appointing people following the hearings in the middle of September.

[55] THE COURT: Mr. Drooyan, the hole that the affidavit of one of these prisoners described is in accordance with my recollection. Was that a reasonable description?

MR. DROOYAN: In terms of the restrictions?

THE COURT: The facilities, yes, where the toilet is a hole in the floor, where they have no furniture, no bed. Do they have a bed?

AGENT MANSFIELD: Yes.

MR. DROOYAN: Your Honor—

THE COURT: Can you answer that, sir?

AGENT MANSFIELD: Yes, sir, they do have a bed and a toilet in the room, yes. The range they were in, which was on the B range, does have a toilet and a bed in the room. They are also allowed out on a daily basis for exercise, showering, and they are allowed outdoors outside to play basketball, handball.

THE COURT: With whom?

AGENT MANSFIELD: Other inmates.

THE COURT: The general population?

AGENT MANSFIELD: No. Inmates in the segregated unit, where they were, the administrative segregation.

THE COURT: Thank you.

I have read with considerable concern the case [56] of United States v. Clardy.

MR. DROOYAN: Your Honor, may I comment on that case?

THE COURT: Surely.

MR. DROOYAN: Mr. Oppenheimer I believe was responsible for the reply, and in that reply he indicates two things about that Clardy decision. One, it was limited to situations in which the administrative detention was used solely for the purposes of maintaining prison order, then citing United States v. Duke, in which the Fifth Circuit expressly recognized that not only was it a method for

disciplining or investigating inmates as well as providing a general cooling down period.

The second thing is that the reply indicates that in Clardy there was nothing in the record with respect to the deprivation that is involved in the [57] administrative detention, and that, therefore, the Court didn't specifically consider that, but in the opinion itself the Ninth Circuit noted specifically that actual physical restraint may have increased, and free association may have diminished, and yet even in light of that the Court looked at the administrative detention and decided that it didn't constitute an arrest for purposes of the Speedy Trial Act—speedy trial right under the Sixth Amendment.

THE COURT: Yes, I did see that. However, they did say:

"We do not say that appellant's status as prisoners automatically precluded assertion of the claim presently sub judice, but based upon all the facts and circumstances, their speedy trial claims are unpersuasive."

The Clardy case is certainly relevant to this situation, but I just can't see the government can contend that due process rights were not denied these men when for seven months they were kept under such circumstances that they themselves could not make any investigation among the prisoners, and I can understand that might be very difficult, but a fortiori they were not given the opportunity to have attorneys to preserve whatever case they might have had or been able to develop [58] while the government was, at its leisure, making its own investigation, apparently throughout the country, and by the time they did get an attorney, memories inherently had dimmed, and some of the prospective witnesses were strewn all over the country.

I just cannot understand how the government, who had made the focus of guilt upon these people to the point of keeping them in isolation or virtual isolation, could deprive them of an attorney despite their requests.

MR. DROOYAN: Your Honor, with respect to the isolation, the reason why they were in isolation after the first couple of months was because they were to be transferred to the Marion control unit.

THE COURT: They didn't transfer them.

MR. DROOYAN: No. I think the reason why they did not transfer them to the Marion control unit was because of the view that there would be an indictment coming out of this district and that it would be inappropriate to transfer them.

I think in other cases where there have been prison murders and substantially greater periods of time have elapsed between the date of the indictment and the date of the murder, inmates have been sent to the Marion control unit, in which the entire prison is, in effect, an isolation unit. My understanding of the conditions in [59] Marion is such that inmates do not leave their cells without handcuffs; they are severely restricted; and that it is, in effect, an isolation unit. But that didn't happen in this case.

THE COURT: Should I congratulate the government?

MR. DROOYAN: Well, your Honor, I think you should congratulate the government, because I think this is one of the fastest returns of an indictment we have had in this district in a murder case for a number of years.

The term in which the average murder case is returned is over a year, and we did this in seven months. We worked diligently. We pursued the investigation.

THE COURT: I don't doubt your diligence, but apparently it was a difficult investigation, and it would be just as difficult for the defendants, too, but it was a one-sided affair. You had these fellows cooped up while you were making the investigation against them, and they didn't have opportunity one to have an attorney make an investigation on their behalf.

MR. DROOYAN: Your Honor, my understanding of the basis for the Court's prior discovery rulings took that into account. I think that the defendants in this case have had more liberal discovery because of that fact [60] in order to permit them to see—now, I want to—

THE COURT: Over the opposition of the defendant, the Court did its best to make up for lost time—over the opposition of the government, I should say.

You fought that every step of the way.

MR. DROOYAN: I did, your Honor, and I want to advise the Court what the status of that is. Because of this hearing Mr. Saul and Mr. Diamond agreed that the government could turn over the material today and we have withdrawn the appeal on that matter.

All I can say is we proceeded as expeditiously as possible. I don't think they have established in their papers the prejudice necessary to establish a due process violation.

There are vague allegations that people have been transferred, that people don't want to come in and perjure themselves because they don't remember every detail, and I think that is inherently unbelievable.

THE COURT: After eight months?

MR. DROOYAN: That somebody—I could understand somebody might not have all of the details, although I suggest to the court that the murder was well known in the prison at the time it occurred, and that people will recollect where they were and what happened [61] because of the significance of the event, but even if memories have dimmed somewhat, and that is not, your Honor, just by itself a basis for finding a due process violation, I submit the argument that people will not testify because they can't remember all of the details, because they are afraid of perjury indictments, is absurd.

THE COURT: All right.

MR. DROOYAN: That is the argument they are making. They are not making the argument that these people can't come in and testify as to generally what happened.

THE COURT: That is an argument they are making, but the one on which I am seeking to focus, Mr. Drooyan, is the fact that all this time they sought an attorney. The finger of suspicion was clearly upon them, and they did not have an attorney. And you have just previously acknowledged that if the finger of suspicion was that strong on people normally out on the street, why, they would have been arrested long since and they would have had people to represent them, and prisoners in Lompoc are not deprived of those constitutional rights by the mere fact that they are prisoners.

MR. DROOYAN: Well, your Honor, I think the Court has equated the prison situation to a murder which occurs

on the street, and I just don't think that they [62] are equal situations.

THE COURT: No, they are not. One is a prisoner and the other isn't, but that doesn't mean that the former are not entitled to an attorney when an investigation for murder is in process.

MR. DROOYAN: Your Honor, I mean the case law that the government cited to the court indicates they are not entitled to an attorney at this stage of the proceeding.

THE COURT: What says they are not entitled to an attorney? Nothing in Clardy says that.

MR. DROOYAN: No, but the Kirby case and the cases that say that it was to be at a formal accusation when the government initiates prosecution.

THE COURT: So there was really no accusation. They were just put there in solitary or semi-solitary because the government suspected them of committing the murder, but they didn't have to formally accuse them because they already had them under their control.

MR. DROOYAN: Your Honor, I think they are different situations. Because of the problems the prison has in maintaining discipline, the extraordinary latitude the courts give to the prisons in maintaining—

THE COURT: With respect, I cannot say that the government was not justified in segregating these [63] people, but I do say that the fact of segregating them is as close to an arrest as is possible with a person in prison, and all of those factors that the Supreme Court talked about with respect to the right to a speedy trial after arrest—many of them come into play here: the mental concern; the obliquity that occurs. I don't say that the government had to take them before the grand jury as promptly as they would have had to do if they were out on the street, but I do say that under the circumstances under which these men found themselves, if they requested an attorney, they were entitled to an attorney.

MR. DROOYAN: Well, your Honor, first of all, the Clardy decision is not a right-to-an-attorney decision.

THE COURT: That is right.

MR. DROOYAN: It is strictly a Sixth Amendment speedy trial case.

THE COURT: That is right.

MR. DROOYAN: In that case and the other cases the courts have each said the Sixth Amendment is not triggered with speedy trial purposes with the placements in administrative detention.

THE COURT: All right.

MR. DROOYAN: That is what the motion to [64] dismiss is based upon.

THE COURT: It is based upon due process also and the right to an attorney and the failure of the government to provide an attorney.

MR. DROOYAN: Well, I don't understand the motion to be based upon that, because I understand the claim of the right to an attorney to be a motion to exclude evidence, which is the third section of the brief, and the analysis that has to be undertaken with respect to first speedy trial and then due process indicates that the case should not be dismissed.

THE COURT: All right.

MR. DROOYAN: First of all, speedy trial, you should simply have the Clardy decision and those decisions. I think that is clear.

The key issue in the case would be with respect to the pre-indictment delay with respect to the due process clause. That is the only conceivable area.

There is a two-point analysis. One is the prejudice, assuming they have established the prejudice, and that is a high burden, every court that reviewed this issue has said that is a high burden that the defense must meet.

Then the question focuses on the Government's conduct in delaying the indictment. First of all, there [65] is no delay. It is eight months. We proceeded as expeditiously as you can. When you compare it to any other cases brought in this Court out of Lompoc, this is the fastest one.

The second thing is that there was no delay. There was no attempt to gain tactical advantages. We proceeded expeditiously, we followed up leads. Under a strict analysis, un-

der the due process clause there is no violation of their Fifth Amendment rights.

Then they move on to the claim of they were denied the right to counsel at time that they were examined by the FBI agents two hours after the murder, and they moved to exclude that evidence. I submit under any theory there was no right to counsel at that point.

If ever there was a right to counsel, it would be after formal accusations by the A.D.U. and a determination based upon the evidence presented there.

THE COURT: All right.

The Court rules that the indictment will be dismissed, first, because of the right to speedy trial. The Court finds that, although in prison, the finger of suspicion is upon them to the point where they are put and kept in quasi-isolation. That is comparable to an arrest, which triggers the right to be brought before a magistrate and at least counsel appointed for them. The [66] Court rules that under circumstances of that kind the defendants are entitled to a much more prompt indictment than occurred in the present instance and a fortiori the appointment of counsel.

The Court further finds that their Fifth Amendment rights were violated by the fact that for eight months, while the government was proceeding with its investigation, the defendants were deprived of counsel and thus had no opportunity through counsel to make a comparable investigation on their own behalf.

The Court further finds, as a third reason, that the right—well, I think that covers it. I think the right to counsel here was most important, and I think prejudice has been shown by the fact that an eight-month delay has occurred before counsel was appointed. Memories can dim and undoubtedly have dimmed as to who were present at particular times. Defense counsel just has no opportunity to make the kind of investigation that the government made.

I expect that you will appeal this, Mr. Drooyan.

MR. DROOYAN: Yes, your honor.

* * *

Supreme Court of the United States

No. 83-128

UNITED STATES, PETITIONER,

v.

WILLIAM GOUVEIA, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 17, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

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No. 83-128

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

WILLIAM GOUVEIA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF RESPONDENTS ROBERT E. MILLS
AND RICHARD RAYMOND PIERCE IN OPPOSITION
TO THE PETITION**

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QUESTIONS PRESENTED

1. May the government, consistent with the Sixth Amendment guarantee of the right to counsel, isolate an inmate-suspect in administrative segregation solely for purposes of pretrial detention and hold him incommunicado without a lawyer for periods of up to 20 months while it builds a criminal case against him?

2. Did the denial of respondents' right to counsel during their prolonged isolation in administrative detention prejudice their ability to mount a defense, justifying the court of appeals' dismissal of the charges against them?

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**BRIEF OF RESPONDENTS ROBERT E. MILLS
AND RICHARD RAYMOND PIERCE
IN OPPOSITION TO THE PETITION**

STATEMENT OF THE CASE

The United States seeks review of the en banc decision of the court of appeals for the Ninth Circuit in this case. By that decision the court of appeals held that the Sixth Amendment guarantee of counsel requires that an indigent federal inmate suspected of a crime and detained in administrative segregation

beyond the period necessary to ensure the security and good order of the institution is entitled to the appointment of counsel upon proof that his continued isolation is primarily in furtherance of an ongoing criminal investigation and impending indictment. The decision below arises from a prosecution that was initially dismissed on identical grounds by the district court prior to trial only to be reversed by a panel of the court of appeals. Following respondents' convictions, en banc review was granted to reconsider the issues raised by this and another, similar appeal.

1. Thomas Hall was murdered at the Lompoc Correctional Institution in August of 1979. Within hours of the crime, respondents were forceably removed from their unit and subjected to interrogation and examination by FBI agents, prison investigators and a prison physician. When advised of their right to appointed counsel, respondents asked to consult with attorneys, but, as were similar pleas they made repeatedly for the next eight months, their requests were denied. Prison officials then transferred respondents to the prison's Administrative Detention Unit ("ADU"), from which they would not emerge until April 21 of the following year, when they were transported to Los Angeles to plead to a murder indictment that had been returned the previous month (App. C, 42a-44a).*

As evidenced by a detention order prepared on the evening of the murder, the government committed respondents to ADU because they were "pending investigation of a violation of institutional regulations" and were "pending investigation or trial for a criminal act" (ER 121, 122). In a space provided on the printed order for explanation of why respondents' continued

* "App." signifies the Appendices to the Petition; "ER" signifies the Excerpts of Record filed in the court of appeals on September 13, 1982; and "Tr." signifies the transcript in this case.

presence in the general population jeopardized the security of the institution, the prison's Correctional Supervisor made no reference to security concerns other than to note that respondents were "pending investigation" (Id.). The government conceded in the district court that as of the date prison officials completed their investigation (September 13, 1979), the sole reason for respondents' continued detention was the ongoing criminal investigation and impending indictment (App. C, 42a-43a).

Throughout the eight-month commitment in ADU that ensued, respondents were confined to three-by-five foot cells for all but 30 minutes per day and occasional respites in designated areas of the prison's visiting room. They remained virtually isolated from the entire prison population. Although prison officials advised respondents that they eventually would be tried for murder, they prohibited respondents from contacting potential inmate or staff witnesses, discussing their case with anyone other than prison and FBI investigators, or arranging examinations by their own doctors or forensic experts (App. C, 44a).

Pursuant to Bureau of Prison Regulations, in September of 1979 respondents were given prison disciplinary hearings, at which they again requested but were denied appointed counsel. Following those hearings -- which were concluded 22 days after respondents' commitment to ADU -- prison authorities stripped respondents of all of their accrued good time, and the prison's internal investigation and disciplinary proceedings were closed (ER 120).

Nonetheless, with the knowledge of the FBI agents in charge of the criminal investigation, respondents remained in ADU -- ostensibly pursuant to regulations which authorized open-ended detention of "pretrial inmates." See 28 C.F.R. § 541.20(a)(3) & (6)(i) (1982). In the meantime, the FBI and federal

prosecutors pursued criminal proceedings at a leisurely pace. As counsel for the government conceded before the district court, by the time respondents were committed to ADU, the authorities believed they had gathered sufficient inculpatory evidence such that had respondents been at-large on the evening of the murder, the government would have promptly arrested them, taken them before a magistrate and provided them with lawyers (Tr. [July 21, 1980] 49-50; App. C, 46a). Because respondents were already in custody, however, the government did not present its case to a grand jury for another seven months -- four months after it completed its forensic analyses, five months after it secured the cooperation of various inmate witnesses, and six months after it identified and debriefed the prison employees on whose testimony it expected to rely (App. C, 46a).

Respondents were finally arraigned and provided lawyers on April 21, 1980. Because of the belated appointment of counsel and respondents' inability to investigate on their own behalf while in ADU, the district court took an unusually active role in supervising discovery in an attempt to assure fairness in the trial (see Tr. [July 21, 1980] 59-60). In that court's opinion, however, even liberal discovery could not overcome the prejudice resulting from respondents' isolation and lack of representation. On motion of respondents, the district court dismissed the indictments, based on express findings that the respondents' lack of representation while they were held in ADU had unalterably impaired their ability to mount a defense (App. C, 46a-47a, 49a). The district court's finding of prejudice was predicated upon (a) the loss of potential defense witnesses known to respondents only by prison sobriquets whom during respondents' ADU detention the government had transferred to other institutions or released from custody altogether; (b) the loss of testimony of inmates who when first approached by appointed counsel nearly one year after the Hall murder were insufficiently certain of their recollections to run the risk of what they

viewed as certain reprisals by prison officials; (e) the loss of items of potentially exculpatory physical evidence, principally blood-stained clothing, which had deteriorated and which respondents' experts could no longer analyze; (d) the loss of documentary evidence that prison officials had discarded during the nearly one year that respondents went unrepresented; and (e) respondents' inability at the late date counsel were appointed to investigate meaningfully threats made by other inmates on the life of Mr. Hall, circumstances surrounding his placement in protective custody and a prior attempt on his life (ER 80-82; 167-68; 170-79).

As set forth in the government's petition, Judge Gray's dismissal of the indictments was overturned on appeal and the case remanded for trial. Although not particularly relevant to the issues before the Court, the question of respondents' guilt or innocence was hardly as clear-cut as portrayed by the Solicitor General. The forensic evidence, mentioned only in passing by the Solicitor General, itself raised substantial doubt. Thus, FBI and defense criminologists agreed that hair samples extracted from stocking masks admittedly worn by the assailants could not have come from either respondent (Tr. 392-93; 397-400). And, although the government's percipient witnesses and pathologist alike testified that the murder was committed by someone stabbing with his right hand (Tr. 93; 458), the trial evidence unquestionably established respondent Pierce (purportedly the knife-wielding assailant) as left-handed (Tr. 1113-16; 1120-23; 1129).

The government identification testimony was far from conclusive. The prosecution placed considerable reliance on Clifford Wilson, a prison guard who purportedly saw respondent Mills flee from the murder scene. Yet, the government's principal inmate witness testified before the grand jury that

moments after the murder he discovered Guard Wilson asleep at his desk (Tr. 128-29).*

The prosecution's sole eyewitness to the assault itself, inmate Gary Mellon, was contradicted by three other inmates, one called by the government (Tr. 154-55; 992; 1048-50). Each was present at the scene and each testified that the assailants' faces were masked during the murder. Further, Mellon's motives for testifying were suspect. He virtually acknowledged that his cooperation had earned him a release after serving only three years of a 30-year sentence (Tr. 135). Further, Mellon conceded a close relationship with Hall (Tr. 130-31), and other witnesses testified that Mellon had threatened respondent Mills with retribution were he to refuse to intervene on behalf of Hall with an inmate to whom Hall owed a debt (Tr. 1211).

The remainder of the government's case consisted of incredible inmate witness testimony and wholly ambiguous physical evidence. For example, inmate Kurt Ehle -- a self-styled Jewish member of the Aryan Brotherhood -- testified that Mills plotted the Hall murder in his presence. Yet, Ehle conceded that he had arrived at the institution just one week before, was introduced to Mills only after the murder and was literally a complete stranger to Mills at the time of the alleged conversation (Tr. 595). In the same vein, the government relied on the testimony of Butch Wagner who related the substance of incriminating conversations Mills allegedly had with another inmate when all three

* Further, Mr. Wilson described the individual he observed as mustached; but an FBI report of an interview of Mills conducted on the evening of the murder described him as clean-shaven. And, although Guard Wilson claimed to have made a positive identification of Mills within hours of the murder, later that night he authored a report making no reference to Mills and stating only that he believed he "could positively identify [the fleeing assailant] from five-by-eight picture cards" (Tr. 280).

were in ADU following the Hall murder. But as Wagner admitted, unlike Mills and the third inmate, Wagner was in protective custody in ADU at his own request and therefore was "pretty much off limits" (Tr. 355).*

Although handicapped by their lack of representation during the eight months following the Hall murder, respondents were able to offer the testimony of a number of inmates who, with varying degrees of certainty, placed respondents in the prison dining hall at the time of the crime (e.g., Tr. 756-58; 777-79; 801-04; 819-24; 849-51; 1135-37). Similarly, three inmates who were seated adjacent to the entrance to the murder-scene unit testified that they could recall neither respondent entering or leaving (Tr. 682; 708-09; 728). More compelling, however, was evidence concerning the victim largely pieced together from prison records. Tom Hall was a brash, young inmate active in the prison's drug commerce who experienced recurrent problems getting along with his fellow prisoners (Tr. 165-67; 1097; 1108-09; 1451). Months before the altercation with Mills over a debt (and prior to respondent Pierce's transfer to Lompoc), Hall had been labelled a "snitch" (Tr. 1086; 1109) and unidentified inmates set his cell afire as a warning. Soon thereafter, Hall requested that he be placed in ADU for his own protection (Tr. 1086-88; 1093; 1102-03). Writing to his parents from ADU in April 1979, Hall penned a farewell letter and asked that it be read "at my funeral" (Tr. 1104-05; Exh. 105B).

* The "substantial amount of physical evidence . . . linking respondents to the murder" (Petition, pp. 10 & 11), consisted principally of stains on respondents' clothing that appeared to be human blood. The only samples that prosecution experts were able to type, however, tended to prove that respondent Mills had his own blood on his clothing -- not that of the victim. Similarly, according to a defense pathologist, a cut on Mills' arm -- which the government contended was inflicted by respondent Pierce as Mills held the victim -- could not have been produced by the murder weapon. The pathologist further testified that reddish finger impressions noted on Pierce's upper arm when he was examined several hours after the murder would have long before faded had they been inflicted during the assault.

3. Following the four-week jury trial in January 1982, respondents were convicted of the Hall murder and related offenses. While respondents' appeals were pending, the court of appeals on its own motion convened en banc to consider the appeals in United States v. Gouveia, apparently for the purpose of reevaluating the panel decision which had reinstated respondents' indictments. On respondents' motion, their appeals were consolidated with those of the Gouveia appellants (App. A, 2a).

The issue as defined by the en banc court of appeals was "whether, under any circumstances, a federal prisoner suspected of committing a crime while in prison and placed in administrative detention is constitutionally entitled to an attorney prior to indictment" (App. A, 2a). In addressing this question, the court proceeded from the premise, established by decisions of this Court, that an indigent accused's right to counsel attaches when "an attorney is necessary to preserve the accused's right to a fair trial or to ensure that the accused will receive effective assistance of counsel at the trial itself" (App. A, 6a). Under this standard, the court reasoned, open-ended detention of an inmate-suspect in ADU compels the appointment of counsel if the inmate is to be assured a fair trial. It noted that "an inmate suspected of crime must overcome investigatory obstacles even greater than those facing the prosecution," including the rapidly changing composition of the prison population and the reluctance of inmates to become involved (App. A, 11a-12a). The court concluded that "early access to the general prison population is critical to the suspect's ability to prepare and preserve a defense," and that prolonged isolation without counsel invariably jeopardizes an inmate's right to a fair trial (App. A, 12a).

The court of appeals next considered the question of whether, consistent with the decisions of this Court, an inmate isolated in ADU should be considered an "accused" for Sixth Amendment purposes and thus constitutionally

entitled to the assistance of counsel. In analyzing this issue, the court carefully defined the nature of ADU detention it was considering. The court noted it was not dealing with detention imposed as a method of discipline, nor with temporary detention "imposed to diffuse a potentially explosive confrontation and to protect inmates from harm" (App. A, 10a). Rather, at issue was administrative detention of "an indeterminate period" imposed because of a "pending [criminal] investigation or trial for a criminal act" where no demonstrable security-related justifications existed apart from the inmate's status as a "suspect" (App. A, 11a).

Noting that "whether a person stands accused can only be determined from the totality of circumstances" (App. A, 8a), the court next observed that pretrial detention of an inmate serves the same objectives that typically prompt an arrest outside the prison walls: "to protect witnesses and evidence, to facilitate an effective investigation, and to prevent further criminal activity by the suspect" (App. A, 11a). However, while "[u]pon arrest a defendant must be arraigned 'without unnecessary delay' . . . [at which] point the accused is guaranteed the assistance of counsel" (App. A, 12a-13a), within the prison walls no such procedural guarantees operate. Because the accused is already in the government's custody, the prosecution can freely suspend his right to counsel indefinitely. The court rejected such unbridled discretion and held that an inmate pretrial detainee, like an arrestee, is entitled to counsel within a reasonable period of time after he is placed or continued in ADU for pretrial detention.

Exercising its supervisory powers, the court of appeals then fashioned a rule that acknowledged an inmate's Sixth Amendment rights yet preserved the government's legitimate prison security interests. The court noted that under Bureau of Prisons regulations, authorities can commit prisoners to ADU pending prison investigations for only thirty days and thereafter cannot confine them in

punitive detention for more than sixty days. See 28 C.F.R. §541.20 (1982). Because isolation beyond this ninety-day period, except for the rarest of circumstances, is only authorized for "pretrial detainees," the court held that the government should allow an indigent inmate confined in ADU for more than 90 days to demonstrate prima facie that his detention is the product of his status as a suspect in a criminal investigation. Once he carries that burden, prison authorities must demonstrate by reference to specific facts apart from his suspect status why the inmate constitutes a security risk, appoint counsel or release him back into the prison population (App. A, 17a).

Applying this standard, the court held that respondents, who had been isolated in ADU without attorneys for periods of up to 20 months solely because they were subjects of criminal investigations, had been denied their Sixth Amendment right to counsel. After reviewing independently the record in the Mills case, the court agreed with the district court's conclusion that, because of their belated appointment, respondents' counsel simply could not provide their clients with the assistance constitutionally required. Although the court flatly rejected the government's contention that respondents' showing of prejudice had been inadequate, it also suggested that in cases such as this one prejudice may be presumed "because ordinarily it will be impossible adequately either to prove or refute its existence" (App. A, 22a). The court found the presumption unnecessary in this case both because of "evidence that 'substantial prejudice' may have occurred" and because of the government's failure to refute respondents' showing of prejudice (App. A, 22a).

REASONS FOR DENYING THE PETITION

This case presents an exceedingly narrow issue concerning the right to counsel under the Sixth Amendment. Contrary to what the Solicitor General

intimates, respondents were committed to ADU not because they threatened the security or good order of the Lumpoe penitentiary. Nor were they held in solitary confinement because their continued presence in the general prison population posed a threat to the safety of other inmates. Rather, as the government conceded below and as the district court expressly found, respondents were continued in ADU following a 30-day investigatory period solely because they were the targets of an ongoing criminal investigation and probable criminal indictment (App. C, 43a).

The court of appeals therefore had occasion only to consider a very limited question: whether an indigent inmate held in administrative detention as a suspect in a crime long after any security justification ceases to exist is constitutionally entitled to appointed counsel. In answering this question in favor of the right to counsel, the court of appeals scrupulously adhered to prior decisions of this Court. It properly interpreted Bureau of Prisons regulations. It created no conflict among the circuits. And it fashioned a procedural rule implementing the right to counsel that will have little impact on the administration of the federal prison system other than assuring that inmate-suspects, no less than free citizens arrested because of government suspicion, will receive fair trials.

I. THE EN BANC DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE TEACHINGS OF THIS COURT AS WELL AS DECISIONS OF SISTER CIRCUITS.

A. By its terms, the Sixth Amendment entitles an "accused" in a "criminal prosecution" to the assistance of counsel. In urging a conflict between the decision below and decisions of this Court, the Solicitor General maintains that, for purposes of the Sixth Amendment, only by the initiation of formal,

adversary judicial proceedings marked by the return of an indictment does the government constitute a prison inmate an "accused" subject to a "criminal prosecution," and only then is the inmate entitled to the assistance of a lawyer.

But a majority of this Court has never subscribed to such a narrow, rigid view.* Rather, the Court has consistently held that the right to counsel attaches "whenever necessary to assure a meaningful 'defense.'" United States v. Wade, 388 U.S. 218, 225 (1966). The Court has explained that each pretrial setting which arises for evaluation must be examined individually to determine whether the presence of counsel is necessary to assure fairness at the eventual trial. As the Court wrote in United States v. Ash, 413 U.S. 300, 310-11 (1973):

"This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both. In Wade, the Court explained the process of expanding the counsel guarantee to these confrontations:

"When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses

* Kirby v. Illinois, 406 U.S. 682 (1972), on which the Solicitor General principally relies, held only that a per se exclusionary rule does not apply to a post-arrest identification line-up conducted without counsel in the course of "a routine police investigation." Id at 690. The Kirby Court did not have occasion to consider the right to counsel implications of prolonged preindictment confinement such as was the case here, and as the court below noted, "Kirby [was] not a prison case" (App. A, 7a).

against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. 388 U.S., at 224, 18 L. Ed. 2d 1149 (footnote omitted).^{*}

The court of appeals quite properly applied the teachings of this Court when it held that a "critical stage" necessarily ensues at some reasonable point after an inmate is committed to ADU for pretrial detention. As this Court has repeatedly recognized, the right to counsel, if it is to have meaning, must be viewed as more than a trial right. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932). Ultimately, it is the right to the assistance of an attorney "at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, 388 U.S. at 226. Whether it has attached depends not upon wooden formalities but upon whether "the presence of ... counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him ... [and] whether potential substantial prejudice to the defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." Id. at 227.

^{*} Thus, in order to protect a suspect's Fifth Amendment rights, the Court has held that even though formal, adversary proceedings may not have begun, counsel must be present when an individual "is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way [because] [i]t is at this point that our adversary system of criminal proceedings commences" Miranda v. Arizona, 384 U.S. 436, 477 (1966) (emphasis added).

This Court also made clear in United States v. Ash, 413 U.S. at 312, that the right to counsel was borne not only out of an accused's need for assistance with the intricacies of procedural and substantive law but also to establish a measure of balance between the forces of the prosecution and those of the defense in "probing for evidence." See also Coleman v. Alabama, 399 U.S. 1, 9 (1970).^{*} Although the Ash Court held that the right to counsel does not ordinarily attach to a prosecutor's trial preparation interviews with witnesses or the display of photographic arrays, it noted that

"The traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself.

"... No greater limitations are placed on defense counsel in constructing [photo] displays, seeking witnesses, and conducting photographic identifications than those applicable to the prosecution." 413 U.S. at 318.

An inmate-suspect held in ADU without counsel pending indictment and trial is irrevocably deprived of this parity. As the Court said of the similar dilemma faced by an inmate accused of, but untried for, a crime committed outside the prison walls,

"Confined in a prison... [the inmate's] ability to confer with potential defense witnesses, or even keep track of

* Of the importance of this role played by an attorney, the Court in Coleman stated: "trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial." 399 U.S. at 9.

their whereabouts, is obviously impaired. And, while 'evidence and witnesses disappear, memories fade, and events lose their perspective,' a man isolated in prison is powerless to exert his own investigative efforts to mitigate those erosive effects of the passage of time." Smith v. Hooley, 393 U.S. 374, 378 (1969).

By holding respondents here in administrative detention for up to 20 months -- while the population of potential witnesses from which they were isolated was dispersed, while the testimony of potential defense witnesses faded to bare recollection if not rank speculation, and while the probative value of physical evidence was lost -- the government effectively reduced respondents' trial "to a mere formality." United States v. Wade, 388 U.S. at 224.*

Moreover, in determining that respondents' open-ended, pretrial detention constituted a "critical stage," the court of appeals drew a powerful analogy to an arrest outside the prison walls. Under our system of justice, a non-inmate suspect may not, consistent with the Sixth Amendment's right to counsel clause, be deprived of his freedom for an unreasonable period of time without being afforded legal representation. See Coleman v. Alabama, 399 U.S. 1, 15-16 (1970) (Douglas, J., concurring) (contrasting the Russian practice).

* Noting that the prejudice suffered by an unrepresented inmate-detainee is similar to that of a defendant complaining of undue preindictment delay, the Solicitor General suggests that respondents' remedy lies in the due process clause of the Fifth Amendment. But the same could be said of any Sixth Amendment violation in which counsel's absence or belated appointment prevents the defendant from preparing and presenting an adequate defense. See, e.g., Avery v. Alabama, 308 U.S. 444 (1940). Where the presence of counsel can "help avoid that prejudice," prospective application of the right to counsel -- rather than a retrospective analysis under the due process clause -- is warranted. See Coleman v. Alabama, 399 U.S. 1, 9 (1970).

Outside of prison, however, Sixth Amendment protections are implemented by a series of procedural rules that, upon arrest, unalterably results in a prompt hearing and the appointment of counsel. See Fed. R. Crim. P. 5(a) & (c). As the court of appeals concluded, it would "ignore reality" to view Sixth Amendment rights differently in the prison setting simply because the inmate-suspect does not enjoy similar procedural guarantees (App. A 13a).*

The Solicitor General answers this analogy simply by asserting that it is "incorrect to view administrative detention as in any way accusatory" because the "separation of an inmate . . . serves security purposes" and is not intended "to accuse or to initiate judicial proceedings" (Petition, p. 20). This response misses entirely the point of the court of appeals' decision. As the court below held, "when detention is ordered as a disciplinary measure or to prevent disorder it is indeed a matter of internal prison administration. But when used to isolate an inmate pending trial both its purpose and effect is accusatory" (App. A, 15a). Indeed, in fashioning a rule to give effect to the right to counsel in the prison setting, the court of appeals placed the onus on the inmate to demonstrate that his detention is the result of the pendency of a criminal prosecution. Counsel need not be appointed if the government is able to refute this showing by pointing to legitimate security concerns (App. A, 17a).

The Solicitor General also criticizes the decision below by unfairly ascribing to it the general holding that the right to counsel attaches "whenever a potential defendant lacks investigative resources" (Petition, p.21). But the court

* Indeed, the government should be no more able to deprive an inmate-detainee of his right to counsel because he is not statutorily entitled to a prompt initial hearing than it can suspend an arrestee's right to counsel by delaying his initial appearance. See United States ex rel. Burton v. Cuyler, 439 F. Supp. 1173, 1181 (E.D. Pa. 1977), aff'd mem., 582 F.2d 1278 (3rd Cir. 1978). Cf. Smith v. United States, 409 U.S. 1066 (1972) (Douglas, J., dissenting from denial of certiorari) (suggesting that Rule 5 applies to an inmate held in administrative detention pending indictment).

of appeals made clear that it was dealing solely with detention tantamount to an arrest. Unlike the unsuspecting target of a secret investigation or the penurious target of an announced investigation, the inmate-suspect held in ADU -- like the arrestee outside the prison walls -- has been the subject of affirmative, accusatory government conduct rendering him unable to make the kind of pretrial investigation that he would otherwise be able to conduct.

Finally, the Solicitor General maintains that there is no basis in Bureau of Prisons' regulations from which to infer that administrative detention beyond 90 days is accusatory and that, in any event, inmates held pending indictment would not be materially benefitted by the appointment of counsel. In fashioning a prophylactic rule to give effect to the right to counsel, the court below correctly construed Bureau of Prisons' regulations when it determined the period beyond which administrative detention presumptively takes on an accusatory cast. Pursuant to 28 C.F.R. § 541.20(a)(1) & (2) (1982), an inmate being investigated for violating prison regulations may be held in ADU for up to 30 days, at which time he is entitled to a hearing before the Institutional Disciplinary Committee ("IDC"). If it adjudges the inmate guilty, the IDC may impose disciplinary confinement which for even the most severe of offenses cannot exceed 60 days. See id. § 541.11(e). Thus, except for inmates completing terms of disciplinary confinement and those "pending transfer," id. § 541.20(a)(4) & (5), continued ADU detention beyond this 90-day period can be imposed only when the inmate is the subject of a "pending investigation or trial for a criminal act," id. § 541.20(a)(3). The court below was therefore fully justified in attaching significance to ADU commitments of greater than 90 days' duration.*

* The regulations also supposedly require a finding that the inmate's "continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the

(Footnote continued on next page)

The Solicitor General's remaining argument -- that the presence of counsel during prolonged ADU detention is not necessary to assure that the inmate ultimately receives a fair trial -- proceeds from an extremely unrealistic premise. It is indeed true that Bureau of Prisons' regulations provide for assistance by a staff member to interview witnesses and present evidence on behalf of the accused to the IDC. However, as one expert testified at the Mills trial, it is a cardinal principle of survival at a correctional institution such as Lumpoc that inmates do not cooperate with prison officials -- whether or not that cooperation would inure to the benefit of a fellow inmate. See Tr. 1441-42. To suggest that a prison guard could effectively replace experienced defense counsel simply ignores the realities of prison life.*

B. Other courts of appeals have had occasion to consider the Sixth Amendment implications of an ADU commitment, and their reasoning fully supports the decision below. Thus, in United States v. Duke, 527 F.2d 386 (5th Cir.), cert. denied, 426 U.S. 952 (1976), the issue was whether imposition of 35

(Footnote continued from previous page)

institution." 28 C.F.R. § 541.20(a) (1982). This additional condition has little meaning for the pretrial detainee for, as we have seen, prison officials construe it as automatically satisfied when the inmate is "pending investigation." See supra, at p. 3.

The Solicitor General also chides the court below for allegedly ignoring 28 C.F.R. § 541.20(a)(6) (1982), which provides that an inmate completing disciplinary confinement can be maintained in ADU for up to 90 additional days when "placement in general population is not prudent" -- after which he must be released to the general population or transferred. This provision seemingly has no bearing on the issue here since the limitation on additional detention is made expressly inapplicable to "pretrial inmates." See id. § 541.20(a)(6)(i). In any event, the court below might well have disregarded it because it considered the "not prudent" standard too vague to provide any assurance that the inmate held beyond the initial 90-day detention period was not being continued in segregation solely as a result of a pending indictment or trial.

* Seeking to minimize the importance of counsel during prolonged periods of detention, the Solicitor General reports that Bureau of Prisons is unaware "of any instances in which retained counsel have sought access to a prison to conduct an investigation prior to indictment" (Petition, p. 28). One may legitimately ask how many federal prisoners have the resources to hire an attorney or, when isolated in ADU, sufficient access to the outside world to locate a lawyer in the first place.

days of segregated confinement triggered the Sixth Amendment right to a speedy trial when the detention was used "as a method of disciplining or investigating inmates who break prison regulations, of protecting certain inmates from members of the general population, and of providing a general cooling-down period for inmates involved in events that could disrupt the general population." Id. 390. The Fifth Circuit answered this question in the negative. However, it made clear that administrative detention is immune from Sixth Amendment consequences only to the extent that it is "in no way related to or dependent on the prosecution by the federal government of an inmate for that same offense as a violation of federal criminal law." Id. (emphasis added). See also United States v. McLemore, 447 F. Supp. 1229, 1235-36 (E.D. Mich. 1978) (placement in administrative detention of an escapee returned to custody pending his indictment and trial triggered the right to a speedy trial because detention was imposed for the purpose of holding the inmate to answer criminal charges).*

Consistent with the rationale of Duke and its progeny, the court of appeals found that respondents' right to counsel attached precisely because their detention not only "related" to a pending criminal prosecution but was the direct consequence of a decision to hold them to answer criminal charges. The decision

* A similar view was seemingly expressed in United States v. Smith, 464 F.2d 194, 196-97 (10th Cir.), cert. denied, 409 U.S. 1066 (1972), where the court rejected a speedy trial claim of inmates confined in administrative detention "for disciplinary reasons, for the protection of the victim, because of their previous harassment of other inmates, and to prevent the possibility of escape." The court held: "Segregated confinement for institutional reasons is not an arrest." Id. at 197 (emphasis added). Speedy trial claims were also rejected in United States v. Mills, 704 F.2d 1553, 1556 (11th Cir. 1983), where the confinement was for "disciplinary segregation," and in United States v. Manetta, 551 F.2d 1352, 1354 (5th Cir. 1977) where, the court noted, administrative detention was imposed for reasons not appreciably different than in Duke. The only decision conceivably intimating a contrary view is United States v. Blevins, 593 F.2d 646 (5th Cir. 1979), where the defendant claimed he was "placed in administrative segregation pending institution of criminal proceedings." The decision is unclear, however, as to whether prison authorities had independent reasons for imposing the detention. See id. at 647 n.3.

below thus does not stand alone but is the logical extension of virtually every other court of appeals decision considering the Sixth Amendment implications of administrative detention.

C. The rule fashioned by the court of appeals will have little appreciable impact on the administration of the federal prison system. Indeed, we understand that following the August 14, 1980 dismissal of the indictments in this case by the district court, Bureau of Prisons officials at Lompoc initiated the practice of delivering right to counsel admonitions to inmates held in ADU during the pendency of investigations by the FBI and U.S. Attorneys office, and arranged to provide public defenders for those inmates wishing the assistance of counsel. Having had practical experience with these procedures, it is telling that the government in its petition voices only conjecture when it speaks of the interference with prison administration and security that it claims will result from the decision below.*

The Solicitor General also paints a dire picture of the dilemma that it claims will confront prison officials who are unwilling to permit a dangerous inmate-suspect to return to the general population yet who are precluded from transferring that inmate to a more secure institution. That picture is illusory. In the first place, the decision below does not deal with prison transfers and nothing in it even arguably suggests a limitation on the discretion of prison authorities to transfer an inmate from one institution to another. The Solicitor General's contrary conclusion stems from the fact that a transfer "presumably would interfere with [an inmate's] ability to investigate or prepare a defense even more than a continuation of administrative detention" (Petition, p. 27 n.25). But it was not only the impact of an ADU commitment on a prisoner's ability to

* Based on a similar admonition given in a case now pending indictment against an inmate recently transferred to Lompoc from the Marion penitentiary, we suspect that this practice has been reinstated and expanded nationwide.

mount a defense that led the court below to fashion the rule that it did. Additionally, the court of appeals deemed the commitments accusatory because of their purpose -- to isolate and hold the inmate pending indictment and trial in the absence of any threat to the security of the institution. We do not question, nor did the court below, the discretion of prison authorities appropriately to transfer an inmate to a more secure or closely controlled institution once he has been adjudged guilty of a breach of prison rules -- be the violation a crime or otherwise.*

For much the same reason, the court of appeals' decision will not limit a warden's authority to confine a dangerous inmate in ADU when transfer is not a viable alternative. As we noted before, the court of appeals held the right to counsel applicable only when an inmate "make[s] a prima facie showing that one of the reasons for continued detention is the investigation of a felony" and only when the government is unable to "refute the inmate's showing" (App. A, 17a). On the other hand, counsel need not be appointed when articulable facts exist to demonstrate that a particular inmate presents a danger to himself, other inmates or the security of the institution, because confinement under such circumstances will be unrelated to the pending prosecution. And even in those rare instances when the government is unable to justify its security concerns, the result will not be the release of a dangerous inmate into the prison population but simply the appointment of a lawyer.

* Further, it is unlikely that the court of appeals would consider a transfer accusatory because, unlike administrative detention, relocation of an inmate to another institution does not constitute "a 'substantial deprivation of liberty'" (App. A, 9a). For as this Court has held, while a protected liberty interest inheres in remaining free of administrative detention and in the general prison population, an inmate has no protected interest in remaining at a particular institution. Compare Hewitt v. Helms, No. 81-368 (Feb. 22, 1983) (administrative detention), with, e.g., Olim v. Wakinekona, No. 81-1581 (Apr. 26, 1983) (transfer). In any event, because the court of appeals has yet to rule on the question, this is not the appropriate case in which to consider it. See Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955).

Finally, is it simply irresponsible for the Solicitor General to claim that the decision below will result automatically in the dismissal of over 200 pending prosecutions of inmates charged with serious institution crimes. To the extent that the decision below is held applicable to prosecutions pending at the time it was rendered, the Solicitor General's number must be reduced to account for those inmates not indigent, not requesting attorneys, not unrepresented, not held for pretrial detention purposes, not held in ADU for over 90 days, or not prejudiced by their ADU detention.

II. CONSISTENT WITH DECISIONS OF THIS COURT, THE COURT OF APPEALS' DISMISSAL OF THE INDICTMENTS WAS PREDICATED UPON A FINDING OF ACTUAL PREJUDICE, AND ANY IMPLIED PRESUMPTION OF PREJUDICE WAS DICTUM NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The Solicitor General maintains that dismissal of the charges against respondents was unwarranted in the absence of any specific showing of substantial prejudice. But both lower courts found precisely such prejudice. After a searching review of the record compiled after the defense had completed its trial preparations, the district court concluded that the belated appointment of counsel had irrevocably deprived respondents of a meaningful opportunity to answer charges against them. In its order of dismissal the district court made specific reference to

"the dimming of memories of witnesses who could have substantiated [defendants'] alibi; ... the irrevocable loss of inmate witnesses known to the defendants only by prison 'nicknames' now long-since transferred to other institutions or released from custody altogether; and ... the deterioration of physical evidence essential to

corroborate the defendants' testimony and to rebut the evidence against them" (App. C, 47a).

After the careful and independent review of the record reflected in the language of the decision below, the court of appeals agreed: "The record convinces us that preindictment isolation without the assistance of counsel unconstitutionally obstructed the ability of appellants to defend themselves at trial" (App. A, 23a). Under the standard established by this Court in United States v. Morrison, 449 U.S. 361, 365 (1981) -- "demonstrable prejudice, or substantial threat thereof" -- the court of appeals justifiably dismissed the indictments against respondents. The Solicitor General's challenge to the factual underpinnings of the dismissal is wholly without merit and certainly inadequate to disturb this Court's normal rule not to grant certiorari simply "to review evidence and discuss specific facts." Ferguson v. Moore - McCormack Lines, 352 U.S. 521, 537 (1957).

What the Solicitor General seems more concerned with is a statement of the court of appeals that when assessing claims of prejudice to an inmate who has been isolated without a lawyer during a prolonged preindictment period, "[w]e must tip the scales in favor of the locked away accused in order to provide substance to the Sixth Amendment right to counsel" (App. A, 22a). This language, according to the Solicitor General, creates a "virtually irrebuttable presumption [of] prejudice" at odds with Morrison (Petition, p. 15).

But the court below created no such presumption. Rather, acknowledging the difficulties that inhere in the defense of a prison case, it merely cautioned that the courts must be sensitive to claims of actual prejudice because conclusive and irrebuttable proof of prejudice will rarely be available. In any event, that it found actual substantial prejudice in this case renders the Solicitor General's argument academic since this Court does not accept cases simply to review dicta. See Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955).*

* The court's admonition is wholly consistent with Morrison which counsels that courts must be "responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective," and that dismissal is appropriate where there is a "substantial threat" that the defendant was prejudiced by the Sixth Amendment violation. 449 U.S. at 364, 365.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1983

CERTIFICATE OF SERVICE

I, CHARLES P. DIAMOND, a member of the Bar of this Court, hereby certify that on September 22, 1983 Respondents' Brief In Opposition was served upon counsel listed below by depositing copies in the United States mail, with first-class postage prepared, addressed as follows:

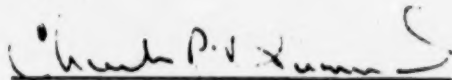
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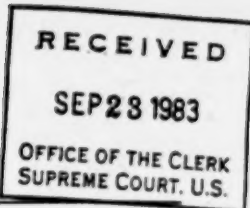
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ORIGINAL

No. 83-128



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

WILLIAM GOUVEIA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents Robert E. Mills and Richard Raymond Pierce, by their counsel of record, hereby petition this Court for leave to proceed in forma pauperis.

Respondents were represented in the courts below by counsel appointed pursuant to the Criminal Justice Act of 1954, 18 U.S.C. § 3006A, and were therein permitted to proceed in forma pauperis.

Respectfully submitted,

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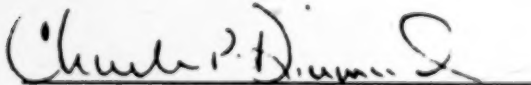
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES OF AMERICA, Petitioner,

vs.

WILLIAM GOUVEIA, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT ROBERT RAMIREZ IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT ROBERT RAMIREZ IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at
704 F. 2d 1116 (9th Cir. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on
April 26, 1983. The petition for writ of certiorari was filed
by the Government on July 25, 1983, after being granted a
thirty-day extension of time. The jurisdiction of the Court
is invoked under 28 U.S.C. 1254(1).

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STATEMENT

Thomas Trejo was an inmate at the Federal Correctional Institute at Lompoc, California. On November 11, 1978, Mr. Trejo, who was also known as "Hopo", was stabbed to death in Cell A-18 of M Unit at the prison. He had received 43 stab wounds in the heart. The autopsy surgeon estimated the time of death to be between noon and 1:00 p.m.

On the evening of November 11, 1978, three of the Respondents in this case, Adolpho Reynoso, Pedro Flores and William Gouveia, were placed in solitary confinement in the Administrative Detention Unit (ADU). On November 22, 1978, these three Respondents were returned to the general population. According to the declaration of James R. Wilkins, the FBI had made a determination as of December 4, 1978, concerning who was responsible for the death of Thomas Trejo. On December 4, 1978, the prison officials placed Adolpho Reynoso, Pedro Flores, William Gouveia, Robert Ramirez, Phillip Segura and Steven Kinard into solitary confinement. These six individuals were the suspects in the Thomas Trejo murder.

However, these six individuals, including the Respondent Robert Ramirez, were not indicted for the murder of Thomas Trejo until June 17, 1980. And the first time that the defendants were brought into court for an arraignment was on July 14, 1980. Thus, Respondent Robert Ramirez remained in solitary confinement as a suspect in the murder of Thomas Trejo for twenty months before being brought to court to face criminal charges alleging that he was the murderer of Thomas Trejo.

Respondent Ramirez, during this period of time, was interrogated by the FBI on three occasions. He was questioned twice in November of 1978 and once on December 4, 1978. On the December 4, 1978 occasion, Respondent Ramirez requested

1 that an attorney be provided for him. This request appears
2 in the FBI report concerning the interrogation prepared by
3 James R. Wilkins. An attorney was not formally appointed to
4 represent Mr. Ramirez on the murder charge until July 14,
5 1980, when Mr. Ramirez appeared to enter a plea of not guilty
6 to the indictment.

7 By the time that Respondent appeared in court on
8 July 14, 1980, over 21 months had passed since the date of
9 the death of Thomas Trejo. Because of the delay on the part
10 of the government, almost two years had elapsed before the
11 Respondent was brought to trial. Because of this long delay
12 in bringing a formal charge against the Respondent and providing
13 him with counsel, the attorney that was ultimately appointed
14 to represent Respondent was forced to conduct an investigation
15 into the case almost two years after the death had occurred.

16 With the passage of so much time between the date of
17 the death and the appointment of counsel for Respondent,
18 several difficulties arose. Witnesses were difficult to locate
19 and memories of the events of November 11, 1978 had begun to
20 fade. Several names listed in the Respondent's "notice of
21 alibi" did not appear and testify at trial because they could
22 not be located. In essence, while the Government was able
23 to begin their investigation on the very day of the murder and
24 continue that investigation for two years, the Respondent, on
25 the other hand, was deprived of the opportunity to conduct a
26 fresh investigation while the memories of witnesses were still
27 clear, and while those witnesses could still be found.

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ARGUMENT

In this case, the Court of Appeals for the Ninth Circuit held that lengthy preindictment isolation without the assistance of counsel irrevocably prejudiced the ability of the Respondents to prepare an effective defense, and thus unconstitutionally deprived them of their Sixth Amendment right to counsel and to a fair trial. United States v. Gouveia, 704 F. 2d 1116, 1119 (9th Cir. 1983). Since the Government's conduct in this case resulted in harm which was not capable of after-the-fact remedy, the Ninth Circuit ruled that the Respondents were in a position similar to suspects who were denied a speedy trial, and thus dismissal of the indictment was the only certain remedy. United States v. Gouveia, supra, at 1125-1127.

A. THE RIGHT TO COUNSEL.

The Government argues that the opinion of the Ninth Circuit is in conflict with Kirby v. Illinois, 406 U.S. 682 (1972). This Court stated in Kirby that the Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated" against an accused. Kirby v. Illinois, supra, at 688. Thus, in Kirby, this Court held that the right to counsel does not attach to out-of-court eyewitness identification procedures conducted prior to indictment. See also, United States v. Ash, 413 U.S. 300 (1973) (no right to counsel at photographic showups).

However, the facts in the case now before this Court are far different from the situations that existed in Kirby and Ash. In Kirby, for example, the defendant was claiming that he was entitled to the presence of counsel at a pre-indictment lineup, which occurred on the same day that the defendant was arrested. The Court was reluctant to extend such a right

1 to counsel, which it noted, did exist during a post-indictment
2 lineup. See, United States v. Wade, 388 U.S. 218 (1968).

3 The Respondent's right to counsel issue does not
4 arise in the context of a pre-indictment lineup. Indeed,
5 eyewitness identification has nothing to do with this case.
6 The Respondent Ramirez and his three co-defendants were
7 deprived of their right to counsel for twenty months while
8 they were placed in solitary confinement as suspects in a
9 prison murder.

10 This occurred while the Government conducted its
11 investigation into the case with the help of the Federal Bureau
12 of Investigation. Since Respondent was serving a federal
13 prison sentence for bank robbery, within a month after the
14 murder, the prison held a prison disciplinary hearing at which
15 the Respondent was found guilty of the murder. His punishment
16 was loss of good time sentence credits and placement in
17 solitary confinement. At the hearing, however, the Respondent
18 asked for the assistance of an attorney. Since the Respondent
19 was indigent, he was unable to privately retain an attorney.
20 No attorney was provided for the Respondent until he was
21 indicted twenty months later.

22 Although the Kirby decision does appear to limit the
23 right to counsel to the post-indictment stage, a different rule
24 must be applied to cases involving prison crimes, such as
25 occurred in this case. In Escobedo v. Illinois, 378 U.S. 478
26 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966), this Court
27 extended the right to counsel to the post-arrest interrogation
28 of an accused by the police, even though such interrogation
29 occurred prior to indictment. Later, in United States v. Wade,
30 388 U.S. 218, 227 (1967), this Court, in extending the right
31 to counsel to the defendant's participation in a lineup, stated
32 that a defendant enjoys a right to counsel at every critical

1 stage in the prosecution.

2 Clearly a critical stage in the prosecution occurred when
3 the Respondent was placed in solitary confinement, deprived of
4 counsel, and excluded from participation in the investigation
5 into the prison homicide in which he was a suspect. Respondent's
6 placement in solitary confinement was clearly the first step
7 in the prosecution by the Government of its case against the
8 Respondent and his co-defendants. The Government's argument
9 that the administrative detention of a prisoner, who is a
10 suspect in a prison crime, is not accusatory, is an argument
11 that ignores the reality of what occurred in this case. The
12 placement of the Respondent in solitary confinement was not
13 merely a security measure. If it was only a security measure,
14 there would have been no criminal prosecution. Here, there was
15 such a prosecution.

16 It is true that a person is not an "accused" within
17 the meaning of the Sixth Amendment right to a speedy trial
18 until he is indicted. United States v. MacDonald, 456 U.S. 1,
19 6 (1982); United States v. Marion, 404 U.S. 703 (1971).
20 However, MacDonald and Marion are not right-to-counsel cases.
21 They are speedy trial cases, which focus upon the time within
22 which criminal charges are brought to trial. The right to
23 counsel provision of the Constitution is concerned more with
24 the underlying fairness of the proceedings, and thus precise
25 questions of time are not as critical to the determination of
26 when the right to counsel is to apply.

27 The Government has argued that the Ninth Circuit's
28 opinion in this case will interfere with the security measures
29 taken by the prison authorities in connection with prison
30 crimes. It is argued that there should be no right to counsel
31 recognized in this situation because this is merely the
32 investigation stage of the proceeding and the prison has no

1 statutory authority to appoint counsel for prisoners suspected
2 of criminal acts.

3 However, in Miranda and Escobedo, this Court afforded
4 a right to counsel to suspects during custodial interrogation.
5 This was done despite the fact that custodial interrogation is
6 part of the investigatory stage of the prosecution and the fact
7 that the police have no power to appoint counsel for the suspect
8 under interrogation. It was also argued in Miranda and
9 Escobedo that recognition of the right to counsel at the
10 interrogation stage would interfere with police conduct of
11 criminal investigations. However, none of these arguments
12 were accepted by this Court in Miranda or Escobedo.

13 The case of Miranda v. Arizona, 384 U.S. 436 (1966)
14 did not result in the placement of lawyers at police stations
15 for the purpose of being appointed to represent suspects
16 during custodial interrogation. It resulted in the termination
17 of all police interrogation when the suspect, after being
18 informed of his right to counsel, requested counsel to be
19 present at the interrogation.

20 In the same manner, the Ninth Circuit's opinion in
21 the Gouveia case will not result in the placement of lawyers
22 in the prisons to assist the prisoners in the investigation
23 of their cases. It will, however, result in avoiding in the
24 future those situations in which a prisoner is placed in
25 solitary confinement for twenty months prior to indictment
26 without the assistance of counsel during that time.

27 Although the Ninth Circuit's opinion in this case
28 focuses upon the right to counsel, it also rests in part upon
29 the fact that the Government unnecessarily delayed bringing the
30 indictment in this case. During that period of delay, the
31 Government slowly investigated and prepared its case, while the
32 Respondent was kept in isolation away from the assistance of

1 counsel. After the passage of twenty months, when counsel was
2 finally appointed to represent the Respondent, the case had
3 become so old that Respondent's constitutional right to counsel
4 was infringed upon. Thus, the Ninth Circuit's opinion is
5 designed to prevent, in the future, long delays in the
6 initiation of criminal charges in cases involving prison
7 crimes. The ultimate effect, of course, is to protect the
8 accused's right to counsel, recognizing the fact that
9 counsel's effectiveness can best be assured by his early
10 entry into the case on behalf of the accused.^{1/}

11
12 B. THE REMEDY OF DISMISSAL.

13 The Government has also argued that dismissal of the
14 indictment was not the appropriate remedy in this case, even
15 assuming a violation of the right to counsel has occurred.
16 The Government relies upon this Court's recent opinion in
17 United States v. Morrison, 449 U.S. 361 (1981).

18 In Morrison, this Court held that dismissal of an
19 indictment because of a violation of the Sixth Amendment right
20 to counsel is not an appropriate remedy unless there is some
21 showing of an adverse consequence to the representation of
22 the accused or to the fairness of the proceeding leading to
23 conviction. In Morrison, this Court found that no prejudice
24 occurred when the accused was visited by Government agents
25 in the absence of her counsel. Thus, dismissal of the indictment
26

27 1/The Solicitor General has suggested that there is no
28 violation of an inmate's right to counsel because the prison
29 provides a "staff representative" to assist accused prisoners
30 at administrative detention hearings. Such a suggestion is
31 patently absurd. First, the staff member is not a lawyer.
32 Secondly, the staff member is in reality a prison guard.
There is no attorney-client privilege affording the prisoner
confidentiality in his dealings with the staff member. And
finally, the staff member is more likely to be viewed by
the prisoner as a spy for the government.

1 was not appropriate under the facts of the Morrison case.

2 However, this Court's opinion in Morrison did not
3 reject the remedy of dismissal in the appropriate case. This
4 Court stated that "Our approach has thus been to identify and
5 then neutralize the taint by tailoring relief appropriate in
6 the circumstances to assure the defendant the effective
7 assistance of counsel and a fair trial." United States v.
8 Morrison, 449 U.S. 361, 365 (1981). In some cases, the
9 appropriate remedy is to reverse the conviction and order a
10 new trial at which evidence obtained in violation of the right
11 to counsel is suppressed. See, Massiah v. United States,
12 377 U.S. 201 (1964); United States v. Wade, 388 U.S. 218
13 (1967). But where there is a continuing prejudice which
14 cannot be remedied by a new trial or suppression of evidence,
15 this Court has recognized that dismissal of the indictment is
16 the appropriate remedy. United States v. Morrison, supra,
17 at 366 n.2, citing United States v. Marion, 404 U.S. 307,
18 325-326 (1971).

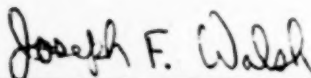
19 The instant case is one where there is a continuing
20 prejudice that cannot be remedied by mere reversal of the
21 conviction or suppression of evidence. Each of the Respondents
22 were unable to locate defense witnesses because the witnesses,
23 many known only by nicknames, were transferred to other
24 institutions, released from custody, or died before the
25 Respondents were indicted and afforded counsel. The
26 Government's delay in indicting the Respondents infringed upon
27 their right to counsel because of counsel's inability to
28 locate and present these defense witnesses. Because the
29 blame is properly placed upon the Government for this
30 infringement of the right to counsel and because it affects
31 the fairness of the proceeding which led to the convictions,
32 dismissal of the indictment is the appropriate remedy in this

1 case. The result reached by the Ninth Circuit is thus a
2 natural extension of this Court's decision in United States
3 v. Morrison, 449 U.S. 361 (1981).
4

5 CONCLUSION

6 Based upon the foregoing, the Respondent Robert
7 Ramirez urges that the Government's petition be denied.
8

9 Respectfully submitted,
10

11 
12

13 JOSEPH F. WALSH
14 Attorney for Respondent
15 ROBERT RAMIREZ
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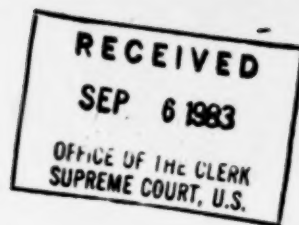
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On August 31, 1983, I served the within
BRIEF OF RESPONDENT ROBERT RAMIREZ IN OPPOSITION

Brooke Moyer

MOTION FILED
SEP 6 1983

ORIGINAL



NO. 83-128

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES OF AMERICA, Petitioner,

vs.

WILLIAM GOUVEIA, et al., Respondents.

MOTION TO PROCEED IN FORMA PAUPERIS
AND FOR THE APPOINTMENT OF COUNSEL;
DECLARATION OF JOSEPH F. WALSH

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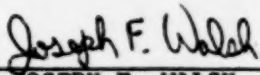
11 IN THE
12 SUPREME COURT OF THE UNITED STATES
13

14 UNITED STATES OF AMERICA,)	NO. 83-128
)	
15 Petitioner,)	MOTION TO PROCEED IN FORMA
)	PAUPERIS AND FOR THE
16 vs.)	APPOINTMENT OF COUNSEL;
)	DECLARATION OF JOSEPH
17 WILLIAM GOUVEIA, et al.,)	F. WALSH
)	
18 Respondents.)	

19 Pursuant to Rule 46 of the Rules of this Court,
20 Respondent ROBERT RAMIREZ asks leave to file an opposition to
21 a petition for writ of certiorari to the United States Court
22 of Appeals for the Ninth Circuit without prepayment of costs
23 and to proceed in forma pauperis.

24 Respondent further requests that Joseph F. Walsh,
25 Attorney at Law, be appointed as counsel for Respondent in
26 this Court. An affidavit in support of this motion is attached.

27 DATED: August 31, 1983.

28 
29 _____
30 JOSEPH F. WALSH
31 Attorney for Respondent
32 ROBERT RAMIREZ

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SEP 24 1983

ALEXANDER L. STEVENS,
CLERK

NO. 83 - 128

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES OF AMERICA, Petitioner,

vs.

WILLIAM GOUVEIA, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT ADOLPHO REYNOSO IN
OPPOSITION

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Attorney for Respondent
ADOLPHO REYNOSO

QUESTIONS PRESENTED

1. Whether, under any circumstances, a federal prisoner placed in administrative detention on suspicion of committing a crime in prison and undergoing a criminal investigation is constitutionally entitled to an attorney prior to indictment?

2. Whether dismissal of the indictment is the appropriate remedy where an indigent federal prisoner is held in solitary confinement for 19 months as a suspect in a murder investigation and his requests for appointed counsel are denied until he is formally indicted 20 months after the alleged crime?

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption of this case, Adolpho Reynoso, Robert Ramirez, Philip Segura, Robert Eugene Mills, and Richard Raymond Pierce were appellants below and are respondents here.

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NO. 83 - 128

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES OF AMERICA, Petitioner,

vs.

WILLIAM GOUVEIA, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT ADOLPHO REYNOSO IN

OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals
is reported at 704 F.2d 1116 (9th Cir.
1983).

JURISDICTION

The judgement of the Court of Appeals was entered on April 26, 1983. The petition for writ of certiorari was filed by the Government on July 25, 1983, after being granted a thirty-day extension of time. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

On November 11, 1978, at approximately 12 noon an inmate named Thomas "Trejo" was stabbed to death in M Unit, at the Federal Correctional Institution, Lompoc, California. There were no eye witnesses to the murder. The body of Trejo was discovered at approximately 4:00 in the afternoon.

On the evening of November 11, 1978, Respondent REYNOSO, Pedro Flores (acquitted in the first trial of all counts) and Respondent William Gouveia were locked down in the isolation unit at Lompoc as suspects in the murder of Trejo.

On November 22, 1978, Respondent REYNOSO was released from isolation to be returned to his unit. On December 4, 1978, Respondent and the other co-defendants were returned to administrative detention at Lompoc, pending investigation by the FBI and the Bureau of Prisons of the murder of Thomas Trejo. No attorney was appointed to represent Respondent during this period of time although requests for appointed counsel were made by Respondent.

From December 4, 1978 until his arraignment on July 14, 1980, Respondent

remained in administrative detention without assistance of counsel. No investigation was conducted; no evidence was preserved on behalf of the Respondent.

The Government by March, 1979, had virtually completed its investigation into the murder of Trejo. All witnesses called before the Grand Jury and known to the Government at the time of indictment had been located and interviewed prior to June, 1979. Dr. Gee, who performed the autopsy of Trejo, was available to the Government as early as November 11, 1978. Richard Villalobos, an inmate was interviewed as a co-operating Government witness in June, 1979. The principal witnesses at the Grand Jury proceeding, including Willard Taylor, a prison inmate, were known and available as early as November 11, 1978. No new percipient witness became available to the Government between

June 1979 and the date of indictment. Virtually all scientific evidence was completed by June, 1979.

A year later, on June 17, 1980, six individuals, including Respondent Adolpho Reynoso, William Gouveia, Philip Segura, and Robert Ramirez were indicted for the murder of Thomas Trejo. A month later on July 14, 1980, Respondent was arraigned and appointed counsel.

A period of twenty-one (21) months elapsed from the date of Trejo's murder to the appointment of counsel. The Government's case was established as early as June, 1979. No significant investigative activity was engaged in by the Government after June, 1979. The Government had methodically built its case between November, 1978 through June, 1979.

In contrast the defense lost the ability to develop a qualitatively sound defense.

Because of the long delay in bringing an indictment and the concurrent delay in appointing defense counsel, Respondent lost the opportunity to locate and call witnesses who could corroborate his two alibi witnesses.

Prison records were inadequate with regards to the identities of inmates present on November 11, 1978.

Those witnesses who could be located were found to have poor memories of the events, a fact the Government quickly seized upon to argue falsity of testimony. The one individual, Michael Thompson, who the defense claimed had actually committed the murder, along with Steven Kennard, had died of natural causes. An additional

witness named Baby Ramirez also died prior to trial. Most of the prison population at Lompoc in November, 1978, had been transferred to various parts of the United States. The Bureau of Prison's records were found to be incomplete, inaccurate, or unavailable. Only last names were included in the rosters provided, and of those provided, no assurances were made, though requested, that the rosters were for November 11, 1978.

In essence, while the Government had virtually completed their investigation, some twelve to fifteen months prior to the indictment, the Respondent remained in administrative confinement, isolated from the general population without resources to hire an attorney, and without the ability to develop and preserve a defense.

ARGUMENT

The Court of Appeals for the Ninth Circuit held that an indigent inmate held in administrative detention beyond ninety days and for the purpose of isolating him from the general prison population pending a criminal investigation, or trial for a criminal act, must be afforded an attorney at Government expense in order to preserve assurance of a fair trial. United States v. Gouveia, 704 F.2d 1116 (9th Cir. 1983) Since the Government's conduct in this case resulted in harm which was not capable of after-the-fact remedy, the Ninth Circuit ruled that the Respondents were in a position similar to suspects who were denied a speedy trial, and thus dismissal of the indictment was the only certain remedy. United States v. Gouveia, supra at 1125-1127.

A. The Right to Counsel

The right to counsel is more than a mere formalism; the right goes beyond the attorney's mere presence at formal judicial proceedings. McMann v. Richardson, 347 U.S. 759 (1970). The concept of the right to counsel:

" . . . is central to that principle that . . . the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in Court, or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment . . . "

United States v. Wade, 388 U.S. 218, 226-22 (1967).

It is the right to a fair trial that the Ninth Circuit has sought to assure. The Government takes the mechanical position that Kirby v. Illinois, 406 U.S. 682 (1972) does not under any

circumstances permit the right to counsel to attach before the bringing of formal adversary judicial proceedings.

The Government takes this position even though failure to appoint counsel to a person in a de facto arrest situation would lead to the derogation of a fair trial due to the denial of effective assistance of counsel. 1/

Respondents were in continuous isolation in administrative detention which

1/ It is ironic that the Government has taken the position that Respondents do not claim that respondents' counsel rendered ineffective assistance. (Petitioner's Brief pg. 14 n.9). What affective difference is there between an inadequate defense due to counsel's incompetency, e.g. failure to present available witness; and ineffective representation due to the loss of the same witnesses, or the presentation of witnesses with poor memories resulting from the inexcusable delay in bringing an indictment and appointing counsel? The result is the same: absence of a fair trial.

effectively cut them off from members of the general prison population. The reason for Respondent's continuous isolation was to restrict his freedom during the pendency of the criminal investigation. The Government makes no effort to distinguish between Respondent's situation, equivalent to an arrest, and the situation of a person arrested and segregated from the general population. The Government's position leads to inconsistency in the application of the Sixth Amendment right. A person arrested for a Federal crime is required to be arraigned "without unnecessary delay". Fed. R. Crim. P. 5(a). At that point, the accused is guaranteed the assistance of counsel. Clearly, a person arrested could not be indeterminately incarcerated, yet be denied assistance of counsel by the mere refusal to file formal charges. Yet, a prison inmate may be de facto arrested,

subjected to all the consequences of isolation and the passage of time, and yet, be denied the ability to secure representation by counsel.

The Court of Appeals choose not to do what the Government does -- ignore reality. Isolation of Respondent from the general prison population for the purpose of criminal investigation precluded him from early access to the general prison population. This coupled with the transient nature of the prison population, made it difficult if not impossible for Respondent, without assistance of counsel, to locate and identify potential defense witnesses. Witness statements could not be taken and preserved, thus, a tool to refresh the memory of the potential witness was lost. The affirmative defense that someone else committed the murder

could not be established, and a critical witness was lost.

In contrast, the Government had all the advantages. It had several agents at its disposal. These agents took the statements of all but one Government witness by December, 1978. One was taken in June, 1979. The statements were written down and later used to refresh the Government's witnesses' memories. The Government had the additional advantage that its witnesses had made their statements implicating the Respondent within days or weeks of the murder of Trejo. By contrast, the Respondent's witnesses were subject to the argument of recent fabrication, or subjected to assessments of low credibility due to poor memories.

As this Court stated in Esobedo v. State of Illinois, 378 U.S. 478, 487-488 (1964):

" . . . the right to use counsel at formal trial [would be] a very hallow thing [if], for all practical purposes, the conviction is already assured by a pre-trial examination . . . One can imagine a cynical prosecutor saying "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at trial."

Similarly, there is nothing that even the most vigorous defense attorney can do to ameliorate the prejudice of lost witnesses, faded memories beyond reconstruction and generally evidence qualitatively eroded by the passage of time. The Government's petition alluding to a trial defense of "uncommon quality and vigor" (Petitioner's Brief, pg. 25), and statements about the quantity of

defense witnesses circumvents the issue of fundamental fairness. Prejudice was born not only of the fact that Respondent produced only two alibi witnesses of his own, but by the relative quality of the defense witnesses whose memories were eroded by the passage of time. It is not the quantity of witnesses but the quality that is paramount. The issue is not the vigor of defense counsel, but his effectiveness.

The Ninth Circuit opinion seeks to attach the right to counsel at a meaningful juncture in Respondent's detention in administrative isolation. As the Court stated in Powell v. Alabama, 287 U.S. 45, 71 (1932), the duty to appoint counsel:

"is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the

preparation and trial of the case."

The Ninth Circuit opinion is correct in view of the "nature of the event and its effect on the rights involved." United States v. Marion, 404 U.S. 307, 327 (1971) (Douglas J. Concurring). While the Respondent was isolated in a jail within a prison, the Government within seven months built and preserved its case while the Respondent proceeded to lose his. Unlike the defendant in United States v. McDonald, 456 U.S. 1 (1981), Respondent did not have the assistance of an attorney, nor was he in the same posture as members of the general prison population who were free to partake in educational programs, work activities, and generally free to go about their affairs within the general prison setting. Respondent was isolated from the general

prison population, restricted to a one man cell up to twenty-three hours per day and unable to participate in the activities of the general prison population (C.R. No. 40, Reynoso Declaration). ^{2/} He was not free to devote his powers to preserving a defense, nor was he provided with the tools to do so.

The Ninth Circuit opinion is consistent with the concept of effective representation of counsel. Nevertheless, the Ninth Circuit's opinion is narrow in scope. It requires a number of pre-conditions to exist before the right to appointed counsel attaches. Initially, the inmate must be in isolation from the prison population; he must be in isolation

^{2/} "C.R." denotes the district court Clerk's Record in the case of the Gouveia respondents.

beyond a ninety-day period; he must be detained in isolation at least in part due to a felony investigation or for criminal trial; and he must be indigent. The Government is not obligated to provide counsel if the inmate is not indigent, or if he is in isolation due to purely administrative reasons. Additionally, the inmate in isolation must request the appointment of counsel. The rule provides the flexibility needed to accomodate legitimate administrative concerns, while at the same time assuring the inmate a fair trial.

B. Remedy of Dismissal

This Court, in United States v. Morrison, 449 U.S. 361, 365 (1981), stated that the remedy for Sixth Amendment deprevations should be tailored to the circumstances so as to assure the defendant effective assistance of counsel

and a fair trial. The Court in United States v. Morrison, supra, did not find adverse affect on the right to effective assistance of counsel by the mere fact that Drug Enforcement Agency agents attempted to solicit the defendant's cooperation without the presence of her attorney. In the present case, however, the Ninth Circuit recognized that Respondents' "isolation without assistance of counsel handicapped [Respondents'] ability to defend themselves at trial." United States vs. Gouveia, 704 F.2d 1116, 1125 (9th Cir. 1983).

The Ninth Circuit further recognized that:

"Prison crimes present suspects with unique investigatory and evidentiary obstacles. And, to repeat, the passage of time greatly exacerbates these difficulties. The length of the delay in appointing counsel for appellants who were likewise denied the opportunity to take measures to preserve their own defense means that the critical

initial stage of investigation was forever lost to appellants." 704 F.2d at 1125.

The prejudice suffered by the inability to locate inmate witnesses (whose names are not known); the inability to produce witnesses whose recollection of events are preserved by written statements; and the loss of witnesses due to death, are not within the class of prejudice that can be cured by a cautionary instruction to a jury, or by suppressing the introduction of Government evidence. The prejudice pervades the entire trial.

The dissenting opinion's contention, that "the likelihood of exonerating testimony from absent witnesses is preeminently a factual matter for the jury's determination ..." United States v. Gouveia, 704 F.2d 1116, 1129 (9th Cir. 1983), fails to recognize the impossibility of introducing into

evidence the expected testimony of a dead witness who has never either testified or been interviewed. At the district court level such exonerating testimony from Michael Thompson, a deceased witness, was rejected by the trial court. An admission by Michael Thompson that he, along with Steven Kennard and Willard Taylor, had killed Thomas Trejo was rejected as untrustworthy hearsay. (R.T. 2096-2111). 3/

The dissent's remedies fail to deal with the basic issue of fairness. It excuses the unjustified delay by the Government and the real advantage it thereby gained, and suggests that competent and vigorous counsel could not have assisted in the preservation of a

3/ "R. T." signifies the Reporter's Transcript in the district court case of the Gouveia Respondents.

defense if appointed some thirteen months earlier. The dissent also equates effective assistance of counsel with technically competent counsel. It fails to recognize, as this court recognized in Powell v. Alabama 287 U.S. 4571 (1932); Escobedo v. Illinois, 378 U.S. 478, 487-488 (1964); and, United States v. Marion, 404 U.S. 307, 327 (1971), that appointment of counsel to one accused must come at a point in time where counsel can be effective. The most competent of counsel can not raise the dead, restore lost memories, or locate those whose names are no longer known or capable of being known.

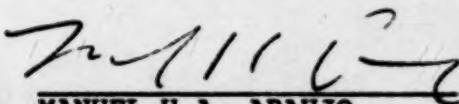
The Ninth Circuit majority recognized the particular need of an indigent inmate who has been isolated pending a criminal investigation to the appointment of counsel. It recognized that the defense had been permanently handicapped by the

long delay and the concurrent failure to appoint counsel. Unlike the facts present in United States v. Morrison, supra, respondents were prejudiced by the absence of counsel at a critical stage in the proceeding. The result reached by the Ninth Circuit was warranted under the facts of the case.

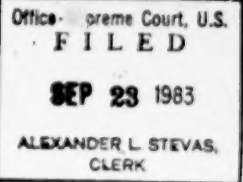
CONCLUSION

Based on the foregoing, the respondent Adolpho Reynoso urges that the Government's Petition be denied.

Respectfully Submitted



MANUEL U.A. ARAUJO
Shipley & Perez
Attorneys for Respondent
Adolpho Reynoso



NO. 83-128

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES OF AMERICA, Petitioner,

vs.

WILLIAM GOUVEIA, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT PHILIP SEGURA IN OPPOSITION

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IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeal, sitting en
banc, is reported at 704 F.2d 1116 (9th Cir. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on
April 26, 1983. The Petition for Writ of Certiorari was filed
by the Government on July 25, 1983 after being granted an
extension of time. The jurisdiction of the Court is invoked
under 28 U.S.C. § 1254(1).

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STATEMENT

On November 11, 1978, an inmate named Thomas Trejo was murdered at the Federal Correctional Institution at Lompoc, California. He was stabbed to death in Cell A-18 of Unit M at that Institution.

On the evening of November 11, 1978, three of the originally charged defendants in this case, to wit: Adolfo Reynosos, Pedro Flores (since acquitted) and William Gouveia were placed in the Administrative Detention Unit (ADU) of the Institution. On November 22, 1978, these three individuals were released from the ADU following a brief investigation of this murder and returned to the general prison population. Thereafter, on December 4, 1978, the F.B.I. and prison authorities made a determination concerning who was responsible for the death of Thomas Trejo and on that date placed respondent Adolfo Reynoso, William Gouveia, Robert Ramirez, Philip Segura and two other individuals, Pedro Flores and Steven Kinard into solitary confinement in the ADU. These six individuals were the primary suspects in the Trejo murder.

On June 17, 1980, approximately twenty months later, these individuals were indicted for the murder of Thomas Trejo. They were initially brought to the Court for arraignment on this indictment on July 14, 1980. Throughout the intervening twenty-month period, these respondents remained in solitary confinement without the assistance of counsel or the ability to communicate with prisoners in the general prison population who might know something about the crime.

///

///

1 Respondent Philip Segura, as well as the other respon-
2 dents, requested the assistance of a lawyer in connection with
3 prison disciplinary proceedings connected with the Thomas Trejo
4 murder. This occurred in the month of December of 1978 when
5 Segura was first placed in the Administrative Detention Unit.
6 His request for the appointment of assistance of counsel in
7 connection with the disciplinary proceedings and to assist him in
8 defending himself on the allegations against him was denied.
9 Segura went to a prison disciplinary hearing in December, 1978
10 and was found guilty of the murder with a subsequent deprivation
11 of good time credits and other penalties. At no time in prepara-
12 tion for this hearing or in the twenty months of solitary confine-
13 ment that followed was Segura afforded the assistance of counsel.
14 This was done for the first time at his arraignment on the
15 indictment in July of 1980.

16 During the intervening twenty months, Segura not only
17 suffered the typical dimming of memories with respect to the
18 facts of this case but also lost, through natural death, the
19 availability of several witnesses who could have testified in his
20 defense. He lost at least two alibi witnesses, as well as the
21 availability of a person who at trial appeared to be another
22 likely suspect who could have committed this murder to the
23 exclusion of appellant Segura and his co-defendants. All of
24 these individuals died by natural death during the intervening
25 period referred to above.

26 Moreover, as the moving papers in a motion to dismiss
27 filed in the District Court showed, counsel for Segura and the
28 other defendants were severely hampered in their ability to inve-
29 stigate and defend against these charges by the passage of time
30 and the unique problems such passage of time causes within the
31 prison system in a case such as this. More specifically, the
32 prison system is replete with transfers of prisoners, knowledge

1 of prisoners only through nicknames and actual release of pri-
2 soners from the prison system itself. By the time counsel were
3 appointed to represent Segura and his co-defendants, many of the
4 persons who knew anything about the crime back in November of
5 1978 were either outside the prison system and unable to be
6 located, transferred within the prison system and unable to be
7 located or their identities were unknown because they were only
8 known through nicknames and were no longer present at Lompoc
9 where they could be interviewed.

10 The Court of Appeal, sitting en banc, agreed with the
11 contentions of appellant Segura and his co-defendants that the
12 fact depicted above constituted a deprivation of Segura's right
13 to counsel under the Sixth Amendment of the United States Consti-
14 tution. The Court also appropriately felt that the only remedy
15 for this violation was dismissal of the indictment. It therefore
16 reversed the convictions and ordered that the indictment against
17 each of the appellants be dismissed.

18
19 ARGUMENT
20

21 In this case, the Court of Appeal for the Ninth Circuit
22 held that the lengthy pre-indictment isolation without the
23 assistance of counsel irrevocably prejudiced the ability of the
24 respondents to prepare an effective defense and thus unconstitu-
25 tionally deprived them of their Sixth Amendment right to counsel
26 and to a fair trial. Since the Government's conduct in this case
27 resulted in harm which was not capable of after-the-fact remedy,
28 the Ninth Circuit ruled that respondents were in a position
29 similar to suspects who were denied a speedy trial and thus
30 dismiss the indictment as the only available remedy. United
31 States v. Gouveia, 704 F.2d 1116, 1125-27 (9th Cir. 1983).

32 ///

1 The Solicitor General now seeks the granting of a
2 petition for a Writ of Certiorari. It is well established
3 that such a writ is "not a matter of right, but of judicial
4 discretion, and will be granted only where there are special
5 and important reasons therefor." Supreme Court Rule 17.1.
6 Upon examination of the opinion of the Court of Appeal for
7 the Ninth Circuit, that opinion is merely a natural exten-
8 sion of prior decisions of the Supreme Court and strikes a
9 reasonable balance between the constitutional rights of
10 indigent federal inmates and the needs of the correctional
11 institutions. Therefore, the scarce decisional resources of
12 the Supreme Court should be confined to more important
13 matters that justify review by certiorari and the instant
14 petition should therefore be denied.
15

16 A. THE SIXTH AMENDMENT REQUIRES APPOINTMENT
17 OF COUNSEL TO INDIGENT INMATES WHO HAVE
18 BEEN ISOLATED FROM THE GENERAL PRISON
19 POPULATION PENDING INVESTIGATION AND PROSECUTION.
20

21 Although lawful imprisonment may curtail many rights
22 and privileges afforded other citizens, the prisoner is not
23 wholly without constitutional protection when he is imprisoned
24 for a crime. "There is no iron curtain drawn between the Constitu-
25 tion and the prisons of this country." Wolff v. McDonnell, 418
26 U.S. 539, 555-56 (1974). To determine which constitutional
27 rights will survive imprisonment, and to what extent these rights
28 will be available to the prisoner, one must find a point of
29 mutual accommodation between institutional needs and objectives
30 and the provisions of the Constitution which are applicable. Id.
31 The decision of the Court of Appeals for the Ninth Circuit
32 reached such a mutual accommodation by structuring a rule based

1 on existing prison regulations. The rule will provide
2 indigent inmates with needed legal counsel only when deten-
3 tion is in contemplation of criminal prosecution, thus,
4 preserving the inmates' Sixth Amendment right to counsel with a
5 minimal intrusion into the prison disciplinary proceedings.

6 The Court of Appeals for the Ninth Circuit held that if
7 an inmate is confined in isolation for more than 90 days, the
8 maximum disciplinary period provided in the prison regulations,
9 he should be allowed to show, and it is in fact presumed, that
10 his detention is due to a pending investigation or trial for a
11 criminal act. United States v. Gouveia, 704 F.2d 1116, 1124 (9th
12 Cir. 1983). This holding clearly permits the continued detention
13 of an inmate for prison disciplinary reasons, if the prison
14 officials can show that the inmate is not being held pending a
15 criminal investigation. The Solicitor General, in his petition
16 for certiorari, makes several unfounded and misleading arguments
17 to the effect that the decision below will have significant
18 practical consequences for the administration of federal and
19 state prisons.

20 To avoid claims such as the ones made by the Solicitor
21 General, the Court below set forth specific procedures which must
22 be met before an indigent prisoner may obtain appointed counsel
23 prior to indictment. The Court held:

24 "The inmate must ask for an attorney,
25 establish indigency, and make a prima
26 facie showing that one of the reasons
27 for continued detention is the investi-
28 gation of a felony. At that point
29 prison officials must either refute the
30 inmate's showing, appoint counsel, or
31 release the inmate back into the general
32 prison population." Id.

1 Thus, the Solicitor General's claim that other inmates
2 who have been held over 90 days in administrative detention will
3 automatically have to be released into the general prison popula-
4 tion or will escape criminal penalties entirely as a result of
5 the decision below is clearly without merit. The use of such an
6 unwarranted argument to alarm this Court to grant certiorari
7 should be exposed and rejected.

8 In addition, the Solicitor General argues that the
9 opinion below cannot stand because it is in direct conflict with
10 the holding in Kirby v. Illinois, 406 U.S. 682 (1972). The Court
11 in Kirby concluded that the 6th "Amendment right to counsel
12 attaches only at or after the time that adversary judicial
13 proceedings have been initiated" against a person. Id. at 688.
14 This point in time may arise "by way of formal charge, preli-
15 minary hearing, indictment, information, or arraignment." 406
16 U.S. at 689.

17 However, neither Kirby, nor any of the cases cited
18 therein, dealt with the confinement of a prisoner and when his
19 right to counsel should attach. The initiation of the adversary
20 judicial proceeding was determined to be the point in time when
21 the right to counsel should attach to free citizens in order to
22 adequately protect their constitutional rights. This rule was
23 not designed with the prison environment in mind and thus cannot
24 be mechanically applied to such a situation without some modifi-
25 cation. The court in Wolff v. McDonnell, 418 U.S. 539, 566
26 (1974), recognized the unique situation facing prisoners in
27 disciplinary proceedings and concluded:

28 ". . . [O]ne cannot automatically apply
29 procedural rules designed for free citizens
30 in an open society, or for parolees or
31 probationers under only limited restraints,
32 to the very different situation presented

1 by a disciplinary proceeding in a state
2 prison."

3
4 The Sixth Amendment guarantees that "in all criminal
5 prosecutions, the accused shall enjoy the right . . . to have the
6 Assistance of Counsel for his defense." When one examines the
7 factual scenario surrounding the lengthy confinement of the
8 Respondent in the instant case, there can be no doubt but that he
9 was an "accused" within the meaning of the 6th Amendment, and
10 thus entitled to assistance of counsel.

11 The Respondent Segura and his three co-defendants were
12 placed in solitary confinement for almost two years without the
13 assistance of counsel, despite repeated requests for aid from
14 counsel, while the Government and the F.B.I. slowly and methodi-
15 cally conducted their investigation and prepared their case for
16 trial. Within the first month of solitary confinement, prison
17 officials conducted a disciplinary hearing at which time Respon-
18 dent was found guilty of the murder of Thomas Trejo. As a
19 result, Respondent was sentenced to solitary confinement and lost
20 his accumulated good time credit.

21 Federal prison regulations provide that a maximum stay
22 in isolation for disciplinary purposes is ninety days. 28 C.F.R.
23 § 541.11 (1982). Yet Respondent and his co-defendants were held
24 in solitary confinement for 20 months prior to being indicted.
25 This suggests that the 16 months over and above the maximum
26 three-month disciplinary confinement was in contemplation of
27 criminal prosecution, which was presumed by the Court of Appeal
28 and never refuted. Since Respondent had been found guilty of the
29 murder by prison authorities and was suffering a significant loss
30 of his liberties due to a pending criminal investigation, the
31 initiation of the adversary judicial proceedings had surely
32 begun.

1 In United States v. Wade, 388 U.S. 218, 224 (1967),
2 this court stated that:

3 "[O]ur cases have construed the Sixth
4 Amendment guarantee to apply to 'critical'
5 stages of the proceedings The plain
6 wording of this guarantee thus encompasses
7 counsel's assistance whenever necessary to
8 assure a meaningful 'defense'."

9
10 Respondents clearly lacked a meaningful defense as a result of
11 being denied the aid of counsel for almost two years. While the
12 Government and the F.B.I. gathered testimony and preserved
13 evidence, Respondent was forced to sit in solitary confinement
14 without the aid of learned legal counsel.¹ Twenty months later
15 the Government completed its thorough investigation and indicted
16 Respondent. Only then was Respondent appointed counsel. How-
17 ever, at this point the critical initial stage of investigation
18 was forever lost to Respondents. Memories had faded, witnesses
19 were lost or had died and physical evidence essential to Respon-
20 dents' case had deteriorated. Clearly the confinement of Respon-
21 dent pending state criminal investigation was the initial criti-
22 cal stage in the prosecution. The court in Wade, supra, con-
23 cluded that:

24 ///

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27
28 ¹ It must be noted that a non-indigent inmate placed in solitary
29 confinement could hire counsel at the initial stages of inve-
30 stigation to preserve his right to a fair trial. Respondents
31 lack of effective assistance of counsel and his resultant unfair
32 trial were due solely to his indigency.

1 "[T]he accused is guaranteed that he need not
2 stand alone against the State at any stage of
3 the prosecution, formal or informal, in court
4 or out, where counsel's absence might derogate
5 from the accused's right to a fair trial (foot-
6 note omitted)." 388 U.S. at 226.

7
8 The Court of Appeals for the Ninth Circuit held that
9 Respondents' lack of counsel during the critical initial stages
10 of investigation unconstitutionally obstructed the ability of
11 Respondent to receive a fair trial.

12 The Solicitor General argues that the right to counsel
13 should not apply to the present case since this is the pre-
14 indictment, investigatory stage of the prosecution. Although
15 generally the case, this argument does not hold true for every
16 situation.

17 In Miranda v. Arizona, 384 U.S. 436 (1966), this Court
18 recognized the persuasive realities of the custodial interroga-
19 tion and afforded the suspect the right to appointed counsel in
20 such situations. Two years later, in Matthis v. United States,
21 391 U.S. 1 (1968), this Court held that the interrogation of an
22 incarcerated suspect, whether or not intended to obtain evidence
23 for a criminal prosecution and whether or not related to the
24 offense for which the inmate questioned has been imprisoned, is a
25 "custodial interrogation" under Miranda v. Arizona. This court
26 granted the right to counsel during the interrogation even though
27 the institution of adversary judicial proceedings had not yet
28 occurred and despite the fact that the confrontation was only
29 investigatory.

30 The decision below, viewed in light of the foregoing
31 authorities, is clearly in line with this Court's previous
32 decisions, and is designed to protect the inmate's constitutional

1 right to counsel in the unique situation presented by the instant
2 case.

3
4 B. DISMISSAL OF THE INDICTMENT IS THE ONLY
5 PROPER REMEDY TO NEUTRALIZE THE PREJUDICE
6 SUFFERED BY RESPONDENT.
7

8 The Solicitor General claims that, even assuming
9 arguendo that there has been a Sixth Amendment violation,
10 dismissal of the indictment is an inappropriate remedy. In
11 support of this contention the Solicitor General relies on two
12 points; one, that dismissal of an indictment is a drastic remedy
13 that is rarely appropriate, United States v. Blue, 384 U.S. 251,
14 255 (1966), and two, that dismissal is inappropriate in the
15 absence of any specific showing of prejudice resulting from the
16 failure to appoint counsel.

17 1. In the recent case of United States v.
18 Morrison, 449 U.S. 361 (1981), this Court examined the possibi-
19 lity of dismissal in the event of a violation of the Sixth
20 Amendment's right to counsel. This Court adopted the following
21 approach in order to aid in the selection of a proper remedy:

22 "Our approach has thus been to identify and
23 then neutralize the taint by tailoring relief
24 appropriate in the circumstances to assure
25 the defendant the effective assistance of
26 counsel and a fair trial." Id. at 365.
27

28 Although the Court in Morrison denied the remedy of
29 dismissal for the Sixth Amendment violation which occurred
30 therein, they did not rule out the possibility of granting a
31 dismissal under the appropriate circumstances. This Court
32 concluded in essence that if there was demonstrable prejudice, or

1 a substantial threat thereof, then dismissal of the indictment
2 would be appropriate. Id.

3 The instant case, as noted by the Court below, presents
4 a compelling set of circumstances which justifies the remedy of
5 dismissal. The denial of counsel to the Respondent during the
6 initial critical stage of investigation, while the events sur-
7 rounding the murder were fresh in the minds of all those
8 involved, and for the twenty months thereafter, so permanently
9 prejudiced Respondent's defense that a fair trial could not be
10 had. Thus, in order to neutralize the substantial, permanent
11 prejudice suffered by Respondent, the Court below was left with
12 no alternative but to dismiss the indictment.

13 2. The Solicitor General also argues that there
14 must be some specific showing of prejudice resulting from the
15 constitutional violation in order to justify dismissal. This
16 contention is clearly erroneous in light of this Court's decision
17 in Moore v. Arizona, 414 U.S. 25, 26 (1973). There the court
18 confirmed its earlier decision in Barker v. Wingo, 407 U.S. 514
19 (1972) that an affirmative demonstration of prejudice was not
20 necessary in order to prove a denial of the constitutional right
21 to a speedy trial. Id. at 26.

22 "We regard none of the four factors identified
23 above [length of delay, reason for delay, defen-
24 dant's assertion of his right, and prejudice to
25 the defendant] as either a necessary or sufficient
26 condition to the finding of a deprivation of the
27 right of speedy trial. Rather, they are related
28 factors and must be considered together with such
29 other circumstances as may be relevant. In sum,
30 these factors have no talismanic qualities; courts
31 must still engage in a difficult and sensitive
32 balancing process. But, because we are dealing with

1 a fundamental right of the accused, this process
2 must be carried out with full recognition that the
3 accused's interest in a speedy trial is specifically
4 affirmed in the Constitution." 407 U.S. at 533.
5

6 Similarly, an affirmative demonstration of prejudice is not
7 necessary to prove the denial of the constitutional right to have
8 effective assistance of counsel for a defense.

9 Even assuming this were not the case, the Respondent
10 clearly demonstrated that he had suffered a substantial prejudice
11 as a result of his being denied counsel. Critical alibi wit-
12 nesses and other crime suspects were lost during the inordinant
13 delay through death or the inability to be located. This fact,
14 in itself is sufficient to deny Respondent a fair trial. More-
15 over, as noted by the Court below, it was a significant fact that
16 the government was unable to rebut Respondent's showing of
17 potential prejudice.

18 As a result of foregoing demonstration, and in light of
19 the fact that this Court has been responsive to claims that the
20 government's conduct has rendered counsel's assistance to the
21 defendant ineffective, it is clear that the scales of justice
22 weigh more heavily in favor of dismissal of the indictment in the
23 instant case.

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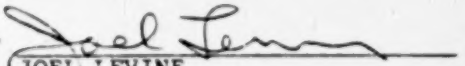
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CONCLUSION

For all of the foregoing reasons, it is hereby respectfully requested that the Solicitor General's Petition for Certiorari be denied.

Respectfully submitted,

STILZ, BOYD, LEVINE & HANDZLIK
A Professional Corporation

By 
JOEL LEVINE
Attorneys for Respondent
PHILIP SEGURA

1
2 PROOF OF SERVICE BY MAIL

3 I affirm that I am a United States citizen, over 18
4 years of age, and not a party to the within action. I am
5 employed in Los Angeles County, California, at 2049 Century Park
6 East, Suite 1200, Los Angeles, California 90067, by Joel Levine,
a member of the Bar of this Court, at whose direction the service
of mail described herein was made.

7 On September 20, 1983, I served the within PETITION FOR
8 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
9 THE NINTH CIRCUIT on the interested parties in said action by
10 depositing a true copy thereof enclosed in a sealed envelope with
11 postage thereon fully prepaid in a mailbox rgularly maintained by
12 the Government of the United States, at Los Angeles, California,
13 addressed as follows:

14 Rex E. Lee, Solicitor General
15 Department of Justice
16 Washington, D.C. 20530
17 Attention: John F. De Pue, Attorney

18 Manuel Araujo, Attorney at Law
19 453 South Spring Street, Suite 1017
20 Los Angeles, California 90013

21 Charles Diamond, Esq.
22 O'Melveny & Meyers
23 611 West Sixth Street
24 Los Angeles, California 90017

25 Edwin S. Saul, Attorney at Law
26 15760 Ventura Boulevard
27 Encino, California 91436

28 Michael J. Treman, Attorney at Law
29 105 East De La Guerra, Suite 5
30 Santa Barbara, California 93101

31 Joseph F. Walsh, Attorney at Law
32 316 West Second Street, Suite 1200
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing
is true and correct.

Dated this 20th day of September, 1983, at Los Angeles,
California.

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ALEXANDER L. STEVAS,
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No. 83-128

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GOUVEIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE

Solicitor General

Department of Justice

Washington, D.C. 20530

(202) 633-2217

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REPLY BRIEF FOR THE UNITED STATES

1. Respondents contend that they were kept in administrative detention not for security reasons but because they were suspects in a criminal investigation of prison murders.¹ But as we explained in our petition (at 15-17), the whole point of administrative detention pending a criminal investigation is to preserve the security of the institution and the safety of those within it, particularly potential witnesses who may be subject to intimidation and subornation of perjury. Moreover, in order to place and retain an inmate in administrative detention pending a criminal investi-

¹ See, e.g., *Mills & Pierce Br. in Opp.* 10-11, 16; *Ramirez Br. in Opp.* 6.

gation, prison officials must find that the inmate's continued presence in the general prison population "poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution." 28 C.F.R. 541.20(a) and (c). Contrary to respondents' suggestion, administrative detention pending a criminal investigation is not intended to serve some sort of symbolic "accusatory" purpose.² Rather, security considerations constitute the heart of the rationale for administrative detention in this and similar cases.

2. Contrary to respondents' contentions, the holding of the court below that they had a constitutional right to counsel during part of the period they were in administrative detention prior to their indictment and arraignment is in no way a "natural extension"³ of this Court's right to counsel decisions. Respondents cite language from *United States v. Ash*, 413 U.S. 300 (1973), and *United States v. Wade*, 388 U.S. 218 (1967), to support the decision of the court below, suggesting that a right to counsel arises whenever it is necessary to a "meaningful defense," or at

² Respondents Segura and Ramirez appear to believe they were segregated from the general prison population for disciplinary reasons. Segura Br. in Opp. 8; Ramirez Br. in Opp. 5. If that were so, it would not affect the conclusion that they were not entitled to appointment of counsel. See Pet. 18 n.14. We note that, in any event, to the extent the record addresses the reasons for respondents' detention, it appears that it was not a disciplinary measure but was for administrative purposes (i.e., because of pending investigations and the associated security concerns). The only disciplinary measure appears to have been loss of good time credits. See Pet. 3-4 n.3, 6 n.5, 8.

³ Segura Br. in Opp. 5.

any "critical stage" of a prosecution.⁴ But the Court in *Ash* and *Wade* was speaking of a right to counsel in the period following the initiation of adversary judicial proceedings. The Court has repeatedly made clear, based on analysis of the language of the Sixth Amendment and the purposes it was intended to serve, that the right to counsel does not arise prior to formal initiation of adversary judicial proceedings. See *Estelle v. Smith*, 451 U.S. 454, 469-470 (1981); *Moore v. Illinois*, 434 U.S. 220, 226-227 (1977); *Brewer v. Williams*, 430 U.S. 387, 398-399 (1977); *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (plurality opinion).⁵ The Court has not confined this proposition to the facts of the cases before it; nor has it given any indication that the constitutional right to counsel somehow expands in a prison setting.⁶ As we showed

⁴ See, e.g., *Mills & Pierce Br. in Opp.* 12-15.

⁵ Several respondents suggest that this Court's decisions in *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), indicate that a Sixth Amendment right to counsel may arise prior to the formal initiation of adversary judicial proceedings. See, e.g., *Segura Br. in Opp.* 10; *Ramirez Br. in Opp.* 5, 7. In those cases the Court indicated that a suspect subjected to custodial interrogation would be entitled to have counsel present during that interrogation. But the Court has made clear that *Escobedo* and *Miranda* are properly viewed as grounded on the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, not on the Sixth Amendment right to counsel. See *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980); *Kirby v. Illinois*, 406 U.S. at 688, 689; *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966).

⁶ Respondents note (as did the court below, *Pet. App.* 12a-13a) that a suspect outside prison who is arrested and detained must appear before a magistrate without unnecessary delay and that such a suspect would be guaranteed the assist-

in our petition (at 17-22), the decision of the court below represents a sharp deviation from this Court's right to counsel decisions. Respondents have not refuted that showing.⁷

ance of counsel at the time of that appearance. See, e.g., *Mills & Pierce Br. in Opp.* 2-16. But it is not the arrest itself that triggers the Sixth Amendment right to counsel. Rather, that right is triggered by the filing of formal criminal charges that is necessary if authorities are to continue to hold a suspect, i.e., by the holding to answer a criminal charge. See *Pet.* 19 & n.15. Respondents' analogy fails, because until such formal charges are brought against an inmate-suspect, no right to counsel attaches.

Respondent Segura (*Br. in Opp.* 7) cites *Wolff v. McDonnell*, 418 U.S. 539 (1974), for the proposition that rules applicable outside a prison cannot always be applied to the prison setting. But the point in *Wolff* was that constitutional rights may be *more limited* in the prison setting. The conclusion of the court below that the right to counsel is *broader* in the prison setting than in the non-prison setting stands *Wolff* on its head.

⁷ Respondents Mills and Pierce also suggest (*Br. in Opp.* 18-20) that their position is supported by various court of appeals' decisions. But even respondents' own account of the decisions suggests that, if anything, they support the position of petitioner and demonstrate that the decision of the court below is truly unprecedented.

Respondents Mills and Pierce particularly emphasize *United States v. Duke*, 527 F.2d 386 (5th Cir.), cert. denied, 426 U.S. 952 (1976). But the court in *Duke* held that administrative segregation did not trigger the Sixth Amendment right to a speedy trial, noting that such segregation does not constitute an arrest and is not inherently dependent on or related to federal prosecution (i.e., it is not instigated by prosecutors), but rather is an internal means of classifying prisoners under the almost total discretion of prison officials. Those observations are fully applicable here. See *Pet.* 19-20. See also *United States v. Daniels*, 698 F.2d 221, 223 (4th Cir. 1983), in which the court held that a suspect's placement in segregation pend-

3. a. Respondents place considerable emphasis on their claims that their administrative detention during the period prior to the time they were indicted interfered with their ability to prepare a defense and thus allegedly deprived them of a fair trial. In particular, respondents claim that they were prejudiced by delay in their opportunity to prepare a defense, allegedly resulting in loss of potential witnesses, and by a "lack of parity" in the trial preparation of respondents and the government.* But such contentions do not somehow mandate the conclusion that respondents must have been deprived of a constitutional right to counsel. As we noted in our petition (at 21-22), respondents' claims concerning their ability to prepare for trial are at most subjects for a due process analysis.

b. Respondents further assert that our second question presented, which concerns the court of appeals' treatment of the issue of prejudice, entails only a fact-specific issue unsuited to consideration by this Court. They misperceive the thrust of our contention. Our point is that, assuming *arguendo* respondents were deprived of a constitutional right to counsel because of their administrative detention in the preindictment period, the court below did not engage in the necessary analysis of whether the alleged deprivation resulted in specific prejudice to respondents. Rather, it rested its conclusion on either a presumption of prejudice or a *pretrial* finding that the ability of respondents Mills and Pierce to prepare for trial had been

ing an FBI investigation of an assault was not the equivalent of an arrest for purposes of the constitutional right to a speedy trial.

* See, e.g., Mills & Pierce Br. in Opp. 14-15; Reynoso Br. in Opp. 12-13, 16.

impaired by their administrative detention. See Pet. App. 20a-23a. In our view, the decisions of this Court require more. In *United States v. Morrison*, 449 U.S. 361, 365 (1981), the Court stated that dismissal of the indictment would be a "plainly inappropriate" remedy in a right to counsel case "absent demonstrable prejudice, or substantial threat thereof." That standard must call for more than a claim that the alleged constitutional violation may have resulted in an inability to locate a few potential witnesses. At the very least, the court should have evaluated what the missing witnesses would have added to respondents' defense, in view of the evidence that respondents in fact were able to produce (*e.g.*, the testimony of the 42 witnesses, including six alibi witnesses, that respondents Mills and Pierce presented at their trial).^{*} The court below did not conduct such an analysis, as evidenced by its reliance (Pet. App. 20a-21a) on the pretrial conclusions of the district court that dis-

^{*} As we pointed out in our petition (at 22-26), a court also should consider various other factors, including whether a defendant remained in the general prison population during some part of the preindictment period, whether and how a defendant's preparation has been aided by access to FBI reports and various prison records, the fact that a defendant has access to a prison staff representative in connection with presentation of his case in a prison disciplinary proceeding, whether jury instructions could cure certain problems, the fact that any party to a criminal proceeding is unlikely to experience ideal conditions in preparation of a case, and so on. We note that several respondents inaccurately describe the staff representatives made available to inmates as prison guards. See Ramirez Br. in Opp. 8 n.1; Mills & Pierce Br. in Opp. 18. The Bureau of Prisons informs us that the staff representative may well be, *e.g.*, a social worker or counselor. In any event, it is the inmate who selects the staff representative. See 28 C.F.R. 541.14(b).

missed the indictments of Mills and Pierce for its conclusion that all respondents must have been deprived of a fair trial as a result of their stay in administrative detention.

4. Respondents suggest that the decision below is a narrow one that will have no major effects on the federal prison system. That suggestion cannot withstand scrutiny. Respondents opine that only a "narrow" class of inmates—those who are indigent, who request attorneys, who are unrepresented, who are held for "pretrial detention purposes," who are held over 90 days, and who are prejudiced by detention—will be affected by this decision. Reynoso Br. in Opp. 18; Mills & Pierce Br. in Opp. 22. But that class is not a narrow one. Respondents themselves recognize that many inmates who commit prison crimes are indigent and unrepresented. See Mills & Pierce Br. in Opp. 18 n.*. Presumably a large number of these inmates request attorneys at some point. All six respondents in this case claim to have done so. Even if some inmates would not request counsel on their own initiative, the court below presumably would conclude that inmates must be informed of the right to counsel.¹⁰ Most inmates held in administrative detention pending a criminal investigation will be there at

¹⁰ In *United States v. Wagner*, No. CR 83-125-RMT (C.D. Cal. Aug. 1, 1983), the district court dismissed yet another prison murder charge, in reliance upon the decision here. It found that the defendant had requested counsel within the meaning of the decision below, despite the fact that (following his initial request for counsel after he was placed in administrative detention and advice from prison officials that it was up to inmates to contact counsel) he never informed prison authorities that the Federal Public Defender's office had declined to assist him because he had not yet been formally charged.

least in part because of the existence of the ongoing investigation (and the security and safety concerns associated therewith). Because of the investigative difficulties the government faces in connection with prison crimes, it is not likely that indictments will be brought within 90 days of a suspect's placement in administrative detention in most cases. Finally, the minimal showing of prejudice required by the court below ensures that few inmates will be screened out on the basis of that factor.

Respondents Mills and Pierce assert that federal prison officials in fact have adopted procedures for appointment of counsel similar to those required by the decision below and that such procedures presumably have not created any major problems (Mills & Pierce Br. in Opp. 20). However, Bureau of Prisons officials have informed us that they have not instituted such procedures and that the instances cited by respondents apparently occurred on an ad hoc basis.¹¹

¹¹ The court of appeals granted a stay of its mandate pending the filing of the government's petition for a writ of certiorari (see Pet. 14 n.8), and the Bureau of Prisons has not attempted to arrange for the provision of counsel while this case remains in litigation. Nor are we aware of any cases in which a court has appointed counsel prior to indictment pursuant to the provisions of the Criminal Justice Act as a result of this case. The Bureau has learned that in one instance a Bureau employee at Lompoc, at the behest of an FBI agent conducting an investigation of a prison murder there, contacted the Federal Public Defender's office to arrange for representation of a suspect in administrative detention. However, that action was not taken in connection with any official Bureau policy.

We note that respondents Mills and Pierce state that prison officials prohibited them from discussing their case with anyone other than prison or FBI investigators. Mills & Pierce Br. in Opp. 3. However, as the court of appeals recognized, re-

So far as we have been able to discover, nothing in the experience of the Bureau of Prisons calls into question our initial evaluation of the practical consequences of the decision below.

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

OCTOBER 1983

spondents apparently could have made unmonitored telephone calls to an attorney if they had sought to do so and were not deprived of visitation rights. See Pet. App. 6a.

No. 83-128

Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GOUVEIA, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment requires appointment of counsel for an indigent prison inmate under criminal investigation during the time he is being held in administrative detention following the alleged offense but before the institution of adversary judicial proceedings.

2. Whether, in the absence of a specific showing of prejudice, dismissal of the indictment is the appropriate remedy for failure to appoint counsel once an indigent prison inmate is held in administrative detention more than 90 days because of a pending criminal investigation.

II

PARTIES TO THE PROCEEDINGS

In addition to the parties shown by the caption of this case, Robert Ramirez, Philip Segura, Adolpho Reynoso, Robert Eugene Mills, and Richard Raymond Pierce were appellants below and are respondents here.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-29a) is reported at 704 F.2d 1116. An earlier opinion of the court of appeals in the case of respondents Mills and Pierce (Pet. App. 30a-40a) is reported at 641 F.2d 785. An earlier opinion of the district court in the case of respondents Mills and Pierce (Pet. App. 41a-50a) is unreported. The oral opinion of the district court denying motions to dismiss the indictment in the case of the Gouveia respondents (J.A. 92-93) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 26, 1983. On June 17, 1983, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including July 25, 1983. The petition was filed on that date and was granted on October 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.

STATEMENT

This case raises the question whether the Sixth Amendment requires that counsel be appointed for an indigent prison inmate under criminal investigation during the time he is held in administrative detention following the alleged offense, but before the institution of adversary judicial proceedings. The court of appeals consolidated appeals from two separate sets of district court convictions involving prison inmate murders, both of which raised this issue.

1. *Respondents Gouveia, Ramirez, Segura and Reynoso*

Following a jury retrial in the United States District Court for the Central District of California, all four respondents were convicted of murder and conspiracy to commit murder, in violation of 18 U.S.C. 1111 and 1117 respectively. Each was sentenced to consecutive terms of imprisonment for life and 99 years (Pet. App. 3a).

a. On November 11, 1978, inmate Thomas Trejo was stabbed to death at the Federal Correctional Institution at Lompoc, California. An autopsy revealed that Trejo had suffered 45 stab wounds, most of which were in the area of his heart (Tr. 149).¹

Following the murder, the Federal Bureau of Investigation and prison officials began independent investigations to determine the identity of the murderers. Respondents Gouveia and Reynoso and inmate Pedro Flores were immediately placed in the Administrative Detention Unit ("ADU") at Lompoc

¹ "Tr." signifies the transcript of the retrial in the case of the *Gouveia* respondents.

(J.A. 8, 10, 15, 44, 50). Inmates in ADU are separated from the remainder of the prison population, and their participation in various prison programs is curtailed. However, they are not deprived of regular visitation rights, exercise periods, access to legal materials, and telephones from which they can make unmonitored calls to attorneys. See Pet. App. 3a, 6a; 28 C.F.R. 540.101, 540.102, 540.105, 541.21, 541.22, 543.11(j), 543.13; J.A. 62; Tr. 2411.

On November 22, 1978, Gouveia, Reynoso, and Flores were removed from ADU and returned to the general prison population (J.A. 8, 15, 50). However, on December 4, 1978, all four respondents, as well as Flores and inmate Steven Kinard, were placed in ADU pending further investigation after prison officials obtained further information that implicated the six in the murder (see *id.* at 8, 12, 15, 31, 50). Later in December, prison authorities conducted disciplinary hearings. Respondents requested appointment of counsel at the hearings, but the requests were denied (*e.g.*, *id.* at 15, 31, 45). Prison officials determined that the four respondents each had participated in the murder of Trejo and ordered that they forfeit accumulated good time and be returned to ADU (Pet. App. 2a; Tr. 1214-1215).² Thereafter, prison

² The reasons for the decision to return respondents to administrative detention are not set forth clearly in the record. A prison form dated December 4, 1978, submitted as an exhibit to co-defendant Flores' motion to dismiss, indicates that he was placed in ADU pending investigation for violations of prison rules and crimes committed in the prison and because his "[c]ontinued presence * * * in general population pose[d] a serious threat" to other inmates and to the security of the institution (J.A. 12). Respondents presumably received forms containing similar information. See *id.* at 83-84, 86, 88-89. The same reasons for detention existed following the disciplinary hearing (with the exception of the investigation for violation of prison rules). A portion of the period of administrative detention following the hearing may also have served

authorities directed that Gouveia and Ramirez be transferred to the control unit of the United States Penitentiary in Marion, Illinois, based on a finding that they were too dangerous to be maintained in the general population at Lompoc (J.A. 33-34, 46-47).

In March 1979, after the FBI notified the United States Attorney of the results of its investigation, presentation of the matter to a grand jury commenced. On June 17, 1980, the grand jury indicted respondents, Flores, and Kinard for murder and conspiracy to commit murder. In addition, Reynoso, Kinard, and Flores were charged with conveyance of a weapon in a penal institution, in violation of 18 U.S.C. 1792. On July 14, 1980, respondents were arraigned in federal court, at which time they were appointed counsel (Pet. App. 3a).^a

b. Prior to trial, respondents and Flores moved to dismiss the indictment on the ground that the 19-month period between their removal to ADU and their indictment violated their Sixth Amendment right to a speedy trial, or, alternatively, constituted unreasonable preindictment delay in violation of the Due Process Clause of the Fifth Amendment. They also argued that the failure of prison authorities to appoint counsel to represent them during the period they were in administrative detention, coupled with their own inability to begin preparation of a defense because of their segregation from the general inmate population, violated their Sixth Amendment right to effective assistance of counsel.

disciplinary purposes, although this is not clear from the record. Gouveia and Ramirez probably were returned to ADU for the additional reason that they were pending transfer to another penal institution. See 28 C.F.R. 541.22(a).

^a By the time of the indictment, several of the respondents had been transferred to other institutions. See, e.g., J.A. 46. After the indictment, respondents were transferred to the Los Angeles County Jail. See Aug. 18, 1980, Hearing Tr. 24.

Respondents made various representations in support of their claims. For example, Gouveia acknowledged that he had obtained some information from the transcript of an FBI interview, and his counsel stated that he had located four potential defense witnesses by using inmate rosters furnished by the Bureau of Prisons; however, Gouveia's counsel asserted that he had been unable to obtain information about two other potential witnesses (J.A. 47, 65). Ramirez claimed that because of his segregation from the general population he had been unable to contact potential witnesses who could verify his whereabouts on the day of Trejo's death; that he knew several of these inmates only by nicknames and thus was unable to establish their identities or determine their whereabouts; and that a potential witness had died since the murder (*id.* at 34). Reynoso alleged that, as the result of his placement in ADU and the ensuing delay, it would be an "impossible task" to locate inmate witnesses, many of whom he knew only by nickname, and to corroborate his alibi that he was watching a football game at the time of the murder (*id.* at 19-20, 21). Segura alleged that he was unable to locate and interview potential witnesses because they had been transferred to other penal institutions and because he had insufficient means of identifying them, and that two alibi witnesses had recently died (*id.* at 27). Following oral argument, the district court denied respondents' motions to dismiss on the ground that "there has been an insufficient showing of actual prejudice to the [respondents] by the passage of time" (*id.* at 92).

c. Trial began on September 16, 1980. The jury acquitted Flores on all counts and acquitted Reynoso on the weapon conveyance count. However, the jury was unable to reach a verdict on the murder and

conspiracy charges against respondents, and a mistrial was declared on those counts (J.A. 1).

Retrial began on February 17, 1981. Kinard, who was the government's principal witness,⁴ testified about the plans to murder Trejo. According to Kinard's testimony, Reynoso had told Kinard in early November 1978 that Trejo "had to go" by Christmas because he had made a "bad move against la cliqua" while incarcerated at Terminal Island (Tr. at 488-489); Ramirez had arranged for another inmate to make several knives with which the murder would be committed (*id.* at 489-500); and on the morning of the murder Reynoso stated that "the fool had to be sent home today" (*id.* at 512-513). Kinard described the four respondents' actions in preparing for the murder and disposing of the weapons and blood-stained clothing. Kinard related that, following the stabbing, Reynoso stated that "[t]he fool's gone * * * he ain't got no heart left" and boasted that he had held Trejo while the other respondents stabbed him (*id.* at 515-559).⁵ The prosecution also introduced evidence that Gouveia's fingerprints and palm print and Segura's palm print were discovered in the cell in which the murder occurred (*id.* at 327-328, 443-444).

⁴ Kinard entered a plea of guilty on the weapon conveyance count prior to the first trial, with the understanding that the government would seek dismissal of the remaining counts and that he would testify on the government's behalf (Tr. 508-509).

⁵ Several other prisoners corroborated portions of Kinard's testimony. For example, one inmate witness testified that he had observed Gouveia and Segura destroying blood-stained prison uniforms shortly after the murder in a cell near the location of the crime (Tr. 1011-1013, 1153-1157). Another testified that Reynoso returned from the prison disciplinary hearing and stated that he had lost only about 20 days' good time and that, if that was all prison authorities were going to do, he would kill again (*id.* at 1214-1215).

Respondents called 34 witnesses, including 14 alibi witnesses, to testify on their behalf (see Pet. App. 28a). Each respondent sought to establish that he was elsewhere at the time of the murder. In addition, the respondents presented evidence that the crime had been committed by others, including Kinard. See pages 56-57, *infra*, for a description of testimony presented by respondents.

2. Respondents Mills and Pierce

Following a jury trial in the United States District Court for the Central District of California, respondents Mills and Pierce were convicted of murder, in violation of 18 U.S.C. 1111, and of conveying a weapon in prison, in violation of 18 U.S.C. 1792. Pierce also was convicted of assaulting another prisoner, in violation of 18 U.S.C. 113(c). Each was sentenced to life imprisonment on the murder charge and to a concurrent three-year term on the weapon conveyance charge (Pet. App. 4a-5a). Pierce received an additional concurrent three-year term on the assault charge (Mills Tr. 1783).

a. On August 22, 1979, Thomas Hall, an inmate at Lompoc, died after being stabbed ten times in the "E" unit of the prison (Mills Tr. 445, 482-483). Shortly after the murder, Mills and Pierce were taken into custody and examined by an FBI agent and a prison doctor, who observed that Mills' face was flushed and that he had two puncture wounds on his left arm and a spot of blood on his thumbnail. Pierce's upper arm bore bruises that appeared to be finger impressions (Mills Tr. 461, 484, 619-621, 628). The following morning, Mills and Pierce were placed in ADU on the ground that they were pending investigation for criminal offenses and violation of prison regulations and that their continued presence in the general prison population "pose[d] a serious threat to life, property, self, staff, other inmates, or

to the security of the institution" (Pet. App. 33a-34a; J.A. 138, 139). The conditions of their confinement in ADU were identical to those described above for the *Gouveia* respondents (Pet. App. 31a).

During disciplinary hearings conducted by the Bureau of Prisons several weeks later, respondents stated that they wished to consult with counsel, but the request was denied (Pet. App. 31a; J.A. 129). Mills declined the offer of assistance of a staff representative to interview witnesses and help prepare his case for the disciplinary proceeding (*id.* at 129-130). See 28 C.F.R. 541.14(b). Prison officials concluded that Mills and Pierce had murdered Hall and returned them to ADU. The two were ordered to forfeit their accumulated good time (Pet. App. 4a). In addition, prison officials informed Mills that he would be transferred to the control unit at Marion Penitentiary (J.A. 130).

On March 27, 1980, after Mills and Pierce had been in administrative detention for approximately seven months, they were indicted by a grand jury. At the time of their arraignment on April 21, 1980, respondents were appointed counsel (Pet. App. 4a).*

b. Mills and Pierce moved to dismiss the indictment on the grounds that their administrative detention for seven months prior to return of the indictment violated their Sixth Amendment right to a speedy trial or, alternatively, constituted unreasonable preindictment delay. They also contended that the failure of prison authorities to appoint counsel to represent them when they were placed in administrative detention violated their Sixth Amendment right to counsel.

* Following their indictments Mills and Pierce were moved to Los Angeles County Jail and to the Terminal Island facility in Los Angeles (J.A. 184).

In support of their claims of prejudice, Mills and Pierce alleged that lack of access to witnesses during the period in which they were confined in ADU "severely undermined" their ability to prepare a defense; that the time lapse following the murder prevented witnesses from recalling the details of the evening of August 22, 1979, "as clearly as they had * * * last fall," and that, in many cases, "defense witnesses are unable * * * to remember who they were with [and] the times crucial events took place" (Memorandum of Points and Authorities in Support of Motion to Dismiss Indictment (Mills C.R. 59) at 16).⁷ Respondents also alleged that the release or transfer of some potential witnesses to other institutions had made it difficult to locate them, that it was impossible to find other potential witnesses who were known only by nicknames, that some witnesses were reluctant to testify, and that memories had faded (*id.* at 16-17; J.A. 125-126, 149-155). Finally, respondents claimed that the time lapse made it impossible to analyze blood stains found on clothing; that evidence relating to the case had been lost or destroyed; and that their own physical wounds, which might have had some probative value for their defense, had healed (*id.* at 126; Reply to Government's Opposition to Motion to Dismiss (Mills C.R. 73) at 7-8).

On August 14, 1980, the district court granted the motion to dismiss the indictment (Pet. App. 41a-50a). The court first concluded that respondents stood accused of the murder at the time they were committed to ADU and that, because the government failed to justify the ensuing ten-month delay in

⁷ "Mills C.R." signifies the district court Clerk's Record in the case of the Mills respondents. The number following the abbreviation corresponds with the entry number on the district court docket sheet.

bringing them to trial, they were denied their Sixth Amendment right to a speedy trial. Alternatively, the court found that respondents were denied due process because their continued administrative detention after the government had substantially completed its investigation irreparably prejudiced their ability to prepare for trial. Finally, the court found that the government's failure to appoint counsel to represent respondents promptly after their placement in ADU deprived them of the Sixth Amendment right to counsel, as well as their due process right to prepare a defense. The court reasoned that respondents "were denied any effective opportunity to have an investigation conducted on their behalf while events were still recent and recollections intact" and that the passage of time "resulted in the irrevocable loss of exculpatory testimony and evidence * * *" (*id.* at 49a, 50a).

c. The court of appeals reversed (Pet. App. 30a-40a). It rejected the district court's holding that the ten-month delay between respondents' placement in ADU and the trial violated the Sixth Amendment Speedy Trial Clause, since administrative detention by prison authorities is not an "arrest" or "accusal" for speedy trial purposes (*id.* at 34a). The court of appeals held that the right to counsel did not attach until the initiation of formal adversary proceedings by way of indictment in March 1980 (*ibid.*). Finally, the court noted respondents' claims of prejudice, but dismissed them as speculative (*id.* at 36a-37a).^{*}

* Judge Nelson issued a concurring opinion in which she stated that respondents' due process claims could properly be raised at trial (Pet. App. 40a).

Following the court of appeals' reversal of the order dismissing the indictment, both respondents filed petitions for writs of certiorari, which were denied by this Court. 454 U.S. 902 (1981).

d. At trial, the government presented eyewitness testimony linking Mills and Pierce to the murder of Hall. The evidence showed that prior to the murder Mills told another inmate that he knew who was responsible for providing information that caused Mills to be placed temporarily in administrative detention and that Mills was going to "take care of it" upon his release from detention (Mills Tr. 344-345); in fact, it was Hall who had provided the information to prison authorities (*id.* at 474-476). The day before the murder Hall confronted Mills and demanded repayment of a debt (*id.* at 289). On the day of the murder there were several confrontations between Hall and Mills and Pierce (*id.* at 76-77, 291-292). After dinner, inmate Mellen, who was Hall's friend, heard Hall scream for help; he then saw Mills hold Hall from behind while Pierce stabbed Hall in the abdomen (*id.* at 88-96, 109).

Other witnesses corroborated Mellen's testimony. For example, inmate Ehle testified that before the murder he had overheard Mills tell inmate John Able, identified as the leader of a prison gang known as the Aryan Brotherhood, that Mills was going to "move on" an inmate who owed him money; Mills asked Able whether the murder would make him eligible for membership in the Brotherhood (Mills Tr. 561-563). Ehle also testified that he overheard Mills discussing the murder with Able after it occurred (*id.* at 591-593). A substantial amount of physical evidence, including blood-stained clothing and wounds on the arms of both Mills and Pierce, linked respondents to the murder (*id.* at 189-190, 418-425, 508-510, 618-621).

Mills and Pierce presented 42 witnesses, including six alibi witnesses. Those witnesses testified, *inter alia*, that Mills and Pierce were eating a meal at the time of the crime and were locked in the dining hall

with other prisoners immediately after its discovery, and that Hall's assailants were masked at all times, so that their identities could not be determined. See pages 57-59, *infra*, for a description of testimony by respondents' witnesses.

3. *The Decision of the Court of Appeals*

The en banc court of appeals consolidated the *Gouveia* and *Mills* cases. By a vote of six to five, it reversed the convictions and remanded for dismissal of the indictments. The majority held that when an inmate is separated from the general prison population for more than 90 days pending a criminal investigation, the Sixth Amendment requires that he be appointed counsel (Pet. App. 17a).

The majority recognized that under this Court's decisions the right to counsel attaches only when formal judicial proceedings are initiated. It reasoned, however, that "[t]he point of 'accusation' may be different for the prosecution of prison crimes, where the subject is already incarcerated and subject to the discretion and discipline of federal authorities" (Pet. App. 7a). Proceeding from this premise, the majority concluded that, although separation of inmates from the general prison population properly serves disciplinary and security functions (*id.* at 10a), such detention becomes "accusatory" when one of the purposes is to isolate the prisoner pending investigation and trial (*id.* at 11a).

The majority acknowledged (Pet. App. 11a) that administrative detention is necessary to further important governmental investigative interests, such as the protection of potential witnesses in the prison population. However, it observed that such detention deprives the prisoner of the opportunity to prepare a defense or even to keep track of the location of other inmate-witnesses in a transient prisoner population. This inability, the majority reasoned,

"distinguishes [respondents] from suspects outside of prison who have not yet been arrested or indicted;" the position of such detainees "more resembles that of a suspect outside of prison who has been arrested and detained than that of an outside suspect who has been neither arrested nor detained" (*id.* at 12a). The majority noted that a suspect outside prison who is arrested and detained normally is arraigned without delay, at which time the right to counsel attaches; it concluded by analogy that "the administrative detention of an indigent inmate who is suspected of a crime does, under certain circumstances, give rise to the right to appointed counsel" (*id.* at 13a, 15a).

The majority then considered the circumstances under which administrative detention would trigger the right to counsel. Purporting to interpret applicable Bureau of Prisons regulations, the majority concluded that the maximum stay in segregation for purely disciplinary reasons is 90 days, and that any segregation for a period exceeding 90 days must be for investigative purposes. The majority stated that "[i]f an inmate is held after the maximum disciplinary period has expired, he should be allowed to show that his detention, at least in part, is due to pending investigation or trial for a criminal act" (Pet. App. 17a). If the inmate establishes indigency and requests counsel, "prison officials must either refute the inmate's showing, appoint counsel, or release the inmate back into the general prison population" (*ibid.*). The majority concluded that prison authorities had violated the 90-day rule it had fashioned and that respondents thus had been denied the right to counsel.*

* The majority found it unnecessary to reach respondents' claims based on the Fifth and Eighth Amendments (Pet. App. 5a).

The majority then held that dismissal of the indictments was the appropriate remedy (Pet. App. 20a-23a). It acknowledged (*id.* at 20a) that under *United States v. Morrison*, 449 U.S. 361, 364-365 (1981), the remedy for Sixth Amendment deprivations must be tailored to the injury suffered. It rejected the government's argument that none of the respondents had demonstrated actual and specific prejudice. The majority concluded that the belated appointment of counsel, coupled with respondents' prolonged administrative detention following the murders, handicapped the ability of respondents' attorneys to defend them at trial, citing the respondents' allegations of prejudice and the statements of the district court that had dismissed the indictments in the *Mills* case at the pretrial stage (Pet. App. 20a-23a). The majority concluded that in any event it was appropriate to presume prejudice because ordinarily it would be difficult to prove or refute its existence (*id.* at 22a-23a).

Judge Wright dissented in an opinion joined by Judges Choy, Kennedy, Anderson, and Poole (Pet. App. 24a-29a). The dissenters pointed out that the majority had confused right to counsel principles with speedy trial principles when it applied a *de facto* accusation concept. They concluded that extension of the right to counsel to the preindictment investigative period contravenes decisions in which this Court has stated that the right to counsel attaches only at the time adversary judicial proceedings are initiated. The dissenters also noted that the majority's presumption of prejudice and dismissal of the indictment were inconsistent with *United States v. Morrison*, *supra*. They pointed out that the potential prejudice referred to by the majority resulted primarily from the passage of time, rather than from ineffective assistance of counsel (Pet. App. 28a), and

that there are adequate remedies, short of dismissal of the indictment, for prejudice resulting from any governmental interference with access to witnesses (*id.* at 28a-29a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals held that the Sixth Amendment requires appointment of counsel for indigent inmates held in administrative detention for more than 90 days pending criminal investigation. It held further that dismissal of the indictment is the proper remedy for the failure to provide counsel under such circumstances.

1. Each respondent was placed in the administrative detention unit at Lompoc after being identified as a suspect in a prison murder, and each remained there until he was transferred to another institution. Bureau of Prisons regulations define administrative detention as "the status of confinement of an inmate in a special housing unit in a cell either by himself or with other inmates which serves to remove the inmate from the general population" (28 C.F.R. 541.22). An administrative detainee normally is confined to his cell except for regular exercise, shower, and visitation periods, and he is deprived of the usual interaction with his fellow prisoners that is provided by shared meals, work and recreation. However, administrative detainees generally are afforded the same privileges as are made available to general population inmates (*e.g.*, commissary, visitation, and correspondence privileges). See 28 C.F.R. 541.22 (d); J.A. 62.¹⁰

¹⁰ Bureau of Prisons regulations distinguish between "administrative detention" and "disciplinary segregation." Under the regulations, "[i]nmates housed in disciplinary segregation have significantly fewer privileges than those housed in administrative detention" (28 C.F.R. 541.12(a)).

Bureau of Prisons regulations provide that inmates may be placed in administrative detention in a variety of circumstances. See 28 C.F.R. 541.22(a). In particular, prison officials may place an inmate in administrative detention "when [his] continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution and when the inmate * * * [i]s pending investigation or trial for a criminal act" (*ibid*).¹¹ Separation of inmate-suspects from the general prison population during the course of a criminal investigation serves a variety of important security purposes, including protection of potential inmate-witnesses from intimidation and prevention of subornation of perjury. It is these all too substantial concerns that underlay the placement of respondents in administrative detention during the time the FBI and prosecutors investigated the murders.

2. a. The court of appeals erred in concluding that the Sixth Amendment requires that counsel be appointed for an indigent prison inmate who is in administrative detention pending a criminal investigation. This Court has held consistently that the Sixth Amendment right to counsel attaches only at or after the institution of adversary judicial proceedings. Thus, respondents had no right to appointment of counsel until they were indicted.

The court of appeals' attempt to analogize segregation of an inmate from the general prison population for more than 90 days pending a criminal investiga-

¹¹ Under the regulations, an inmate may also be placed in administrative detention if he is pending hearing or investigation in connection with a violation of prison regulations, is pending transfer to another institution, needs protection, or is terminating confinement in disciplinary segregation and placement in the general prison population is not prudent (28 C.F.R. 541.22(a)).

tion to a formal accusation is misplaced. It is prison authorities, not prosecutors, who impose administrative detention; moreover, the purpose of such detention is not to accuse but to preserve the safety of others (particularly potential witnesses) and the security of the institution. The court of appeals' additional analogy to an arrest outside prison walls also fails to support its right to counsel analysis. It is not arrest alone that triggers Sixth Amendment rights; rather, it is arrest and holding to answer a criminal charge. Respondents were not held to answer a criminal charge until they were indicted.

The court of appeals based its departure from well-settled right to counsel principles in part on its belief that an inmate who is held in administrative detention is severely disadvantaged, in comparison to an inmate in the general prison population, in his ability to conduct an investigation of the crime and to prepare a defense during the period prior to the time he is actually charged. We submit that the court of appeals erred by, on the one hand, underestimating the opportunities available to inmates in administrative detention to take steps to preserve favorable evidence and, on the other hand, exaggerating the likelihood that inmates released to the general prison population would take significant and legitimate actions to gather evidence that would be unavailable if they remained in segregation. In fact, these differences are not of sufficient consequence to justify the court of appeals' departure from settled Sixth Amendment principles.

b. Assuming arguendo that respondents had a Sixth Amendment right to appointment of counsel after they had been held in administrative detention for 90 days pending criminal investigation, the court of appeals erred in concluding that dismissal of the indictments was the proper remedy when there was

no showing of actual and specific prejudice. This Court has made clear that dismissal of the indictment normally is not an appropriate remedy even for deliberate violations of the right to counsel. See *United States v. Morrison*, 449 U.S. 361, 364-365 (1981). The court of appeals' conclusion that dismissal of the indictment can be based on a potential for prejudice or that a presumption of prejudice is appropriate in connection with administrative detention is inconsistent with the principles articulated in *Morrison*. In fact, a court must conduct a case-specific, post-trial analysis to determine whether a defendant has suffered actual and specific prejudice as a result of the failure to appoint counsel in the preindictment period.

The record in this case illustrates the court of appeals' error in presuming prejudice in connection with administrative detention. In alleging prejudice, respondents failed to show what testimony alleged missing witnesses would have given and how it would have aided the defense; moreover, they did not explain why the testimony would not have been cumulative in view of the numerous alibi witnesses they presented at trial. In addition, respondents Mills and Pierce failed to show that they were prejudiced by the deterioration of physical evidence, which in any event could not have been prevented by their release from administrative detention.

ARGUMENT

I. THE SIXTH AMENDMENT DOES NOT REQUIRE THAT COUNSEL BE APPOINTED FOR AN INDIGENT PRISON INMATE DURING THE PERIOD HE IS HELD IN ADMINISTRATIVE DETENTION PENDING A CRIMINAL INVESTIGATION BUT PRIOR TO THE INSTITUTION OF ADVERSARY JUDICIAL PROCEEDINGS

The court of appeals' conclusion (Pet. App. 17a) that an indigent inmate who is segregated from the

general prison population for more than 90 days because of an ongoing investigation of a prison crime must either be appointed counsel or returned to the general prison population represents a radical departure from the decisions of this Court, which has held consistently that the right to counsel attaches only at the initiation of adversary judicial proceedings. Nothing in the circumstances of this case warrants the court of appeals' "unprecedented expansion of the right to counsel" (*id.* at 24a).¹²

A. The Sixth Amendment Right to Counsel Attaches Only At the Time of Institution of Adversary Judicial Proceedings

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." This Court's decisions firmly establish, as the text of the provision itself suggests, that the right to counsel attaches only at or after the initiation of adversary judicial proceedings:

In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell v. Alabama*, 287 U.S. 45, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. See *Powell v. Alabama*, *supra*; *Johnson v. Zerbst*, 304 U.S. 458; *Hamilton v. Alabama*, 368 U.S. 52;

¹² This case involves only the issue of the right to appointment of counsel for indigent inmates. Respondents were not denied the opportunity to retain their own counsel during the time they were in administrative detention (Pet. App. 3a, 6a). Nor was there any claim that respondents' trial counsel rendered ineffective assistance apart from the contention that failure to appoint counsel at an earlier stage impeded the ability to mount a fully effective defense.

Gideon v. Wainwright, 372 U.S. 335; *White v. Maryland*, 373 U.S. 59; *Massiah v. United States*, 377 U.S. 201; *United States v. Wade*, 388 U.S. 218; *Gilbert v. California*, 388 U.S. 263; *Coleman v. Alabama*, 399 U.S. 1.

* * *

* * * [W]hile members of the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, *all* of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

Kirby v. Illinois, 406 U.S. 682, 688-689 (1972) (plurality opinion) (emphasis in original). The Court has reaffirmed this principle on several occasions since the *Kirby* decision. See *Estelle v. Smith*, 451 U.S. 454, 469-470 (1981); *Moore v. Illinois*, 434 U.S. 220, 226-227 (1977); *Brewer v. Williams*, 430 U.S. 387, 398-399 (1977); *United States v. Mandujano*, 425 U.S. 564, 581 (1976) (opinion of Burger, C.J.).¹⁸

¹⁸ In their briefs in opposition, several respondents suggested that this Court's decisions in *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), indicate that a Sixth Amendment right to counsel may arise prior to the formal initiation of adversary judicial proceedings. See, e.g., *Segura Br. in Opp.* 10; *Ramirez Br. in Opp.* 5, 7. In those cases the Court indicated that a suspect subjected to custodial interrogation would be entitled to have counsel present during that interrogation. But on several occasions the Court has made clear that *Escobedo* and *Miranda* were not intended to vindicate the Sixth Amendment right to counsel, but rather to ensure full effectuation of the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination. See *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980); *Kirby v. Illinois*, 406 U.S. at 688, 689; *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966). Moreover, as the

The Court's holding that the right to counsel does not attach until the initiation of adversary judicial proceedings is firmly grounded in both the language and the purposes of the Sixth Amendment. That provision refers to the right to counsel in "criminal prosecutions" only. See *Kirby v. Illinois*, 406 U.S. at 690. "The requirement that there be a 'prosecution,' means that this constitutional 'right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against [an accused] * * *'" *United States v. Ash*, 413 U.S. 300, 321-322 (1973) (Stewart, J., concurring) (quoting *Kirby*, 406 U.S. at 688). Until the initiation of adversary judicial proceedings—through formal charge, preliminary hearing, indictment, information, or arraignment¹⁴—there is no "prosecution" to which the right of counsel can attach.

The purposes served by the Sixth Amendment right to counsel also support the Court's reading. One purpose is to ensure that an accused may be guided in the intricacies of the law at every "critical stage" of the proceedings against him. See, e.g., *United States v. Ash*, 413 U.S. at 307-308, 311; *Coleman v. Alabama*, 399 U.S. 1, 7 (1970) (plurality opinion); *United States v. Wade*, 388 U.S. 218, 227 (1967). As the Court explained in *Powell v. Alabama*, 287 U.S. 45, 69 (1932), an accused needs counsel in order to determine "whether the indictment is good or bad," to aid him with "the rules of evidence," to ensure that he is not "put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible," and to provide "the skill and knowledge

Court noted in *Kirby*, 406 U.S. at 689, *Escobedo* has been limited to its own facts.

¹⁴ See *Estelle v. Smith*, 451 U.S. at 469-470; *Moore v. Illinois*, 434 U.S. at 226-227; *Kirby v. Illinois*, 406 U.S. at 689.

adequately to prepare his defense." Accord, *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

The right to counsel also helps to minimize the imbalance in the adversary system that resulted from the creation of the office of public prosecutor. The Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938). See also *United States v. Ash*, 413 U.S. at 309. The test for determining whether the right to counsel attaches to a particular event thus rests on an "examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary" (*id.* at 313).

The initiation of adversary judicial criminal proceedings—the point at which the right to counsel attaches—"is far from a mere formalism" (*Kirby v. Illinois*, 406 U.S. at 689). "[I]t is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Ibid.* The right is "historically and rationally applicable only after the onset of formal prosecutorial proceedings" (*id.* at 690).

In this case there was no adversary judicial proceeding prior to the dates the respondents were indicted. During the period prior to indictment, when prison officials held respondents in administrative detention, the government had not initiated a criminal prosecution. Thus, under this Court's decisions, the

right to counsel did not attach during that period, and appointment of counsel was not required by the Sixth Amendment.

B. Segregation of an Inmate From the General Prison Population Pending a Criminal Investigation Is Not Tantamount to a Formal Accusation That Would Trigger the Right to Counsel

The court of appeals attempted to justify its departure from this Court's right to counsel decisions by suggesting that the statements in those decisions do not apply to a "prison case" (Pet. App. 7a). According to the court of appeals (*id.* at 11a), "[a]dministrative detention at times serves an accusatory function * * *." Based on its reading of Bureau of Prisons regulations, the court of appeals created a presumption that any period of segregation of more than 90 days following a prison crime is tantamount to "an accusation which generates a Sixth Amendment right to the assistance of counsel" (*id.* at 18a).¹⁵

¹⁵ In developing its theory of when segregation from the general prison population would become "accusatory," the court of appeals appears to have misconstrued Bureau of Prisons regulations. The court concluded (Pet. App. 17a) that the maximum period of segregation for disciplinary purposes is 90 days and that "[i]solation for more than ninety days, then, is necessarily for some purpose other than discipline." Under 28 C.F.R. 541.11 a prisoner may, following a disciplinary hearing, be placed in disciplinary segregation for up to 60 days (for a single offense) and may be given consecutive terms of up to 60 days for each additional offense. Following termination of disciplinary segregation, an inmate may be held in post-disciplinary (administrative) detention for up to 90 days. See 28 C.F.R. 541.22(a)(6). Thus, on the basis of a single disciplinary infraction a prisoner could be segregated for a period of up to 150 days following a disciplinary hearing. Although the regulations do not place specific time limitations on the duration of a prisoner's confinement in administrative detention, they state that such detention "is to be used only for short periods of time except where an inmate needs long-term

But that reasoning is plainly wrong and does not support the court of appeals' conclusion that a right to counsel attaches during the period of administrative detention.

The court of appeals erred in equating segregation from the general prison population for more than 90 days with an accusation that initiates a criminal prosecution. It is prison authorities, not prosecutors or police, who make the decision to place an inmate in administrative detention and to retain him there.¹⁸ The Fifth Circuit explained this point in *United States v. Duke*, 527 F.2d 386, 390, cert. denied, 426 U.S. 952 (1976) (emphasis added):

*[A]dministrative segregation is an internal disciplinary means of classifying prisoners, utilized under the almost total discretion of prison officials * * *. Used as a method of disciplining or investigating inmates who break prison regulations, of protecting certain inmates from mem-*

protection" and that the prison staff must conduct hearings to review the status of prisoners in administrative detention at 30-day intervals. See 28 C.F.R. 541.22(c).

¹⁸ Indeed, in the *Mills* case, the prosecutor stated, in response to a question from the district court, that he had been unaware that Mills and Pierce had been in administrative detention and that he had had "no communication with prison officials with respect to the status of [respondents] until March," i.e., until shortly before the return of the indictment (J.A. 172).

The district court in the *Mills* case disregarded the prosecutor's explanation that he and the prison authorities had acted independently. The court observed that "for purposes of this case [it] would not distinguish between the Department of Justice [and] the Bureau of Prisons" (J.A. 172). The court of appeals likewise concluded that it "need not inquire into the extent of cooperation between prison officials, the FBI, and the United States Attorney" in placing inmates in administrative detention in determining whether such detention is "accusatory" (Pet. App. 15a).

bers of the general population, and of providing a general cooling-down period for inmates involved in events that could disrupt the general population, administrative segregation accompanying the breach of a prison regulation is in no way related to or dependent on prosecution by the federal government of an inmate for th[e] same offense as a violation of federal criminal law.

See also *United States v. Mills*, 704 F.2d 1553, 1557 (11th Cir. 1983), petition for cert. pending, No. 83-5286 (disciplinary segregation, like administrative segregation, is "distinct from the judicial system").¹⁷

The purpose of administrative detention is not to accuse an inmate or to initiate adversary judicial proceedings. Rather, the objective is to maintain prison security and to assure the safety of prison staff and other inmates, including potential witnesses.¹⁸

¹⁷ The existence of an ongoing criminal investigation while respondents were in administrative detention did not amount to a formal accusation for purposes of the Sixth Amendment. See *United States v. MacDonald*, 456 U.S. 1, 8-9 (1982) (absent a formal charge, an ongoing criminal investigation does not trigger the Sixth Amendment right to a speedy trial); *United States v. Marion*, 404 U.S. 307, 313, 320 (1971).

The court of appeals suggested that administrative detention was equivalent to an accusation for Sixth Amendment purposes because it is a "public act" (Pet. App. 15a). But the court's suggestion disregards its own precedent, *United States v. Clardy*, 540 F.2d 439, 441 (9th Cir.), cert. denied, 429 U.S. 963 (1976), in which it stated that segregation of an inmate from the general prison population is "not a public act with public ramifications, but a private act." Even if administrative detention did constitute a "public act," like an arrest, that would not be sufficient to support a finding of a Sixth Amendment right to counsel. See pages 29-31, *infra*.

¹⁸ The court of appeals itself observed (Pet. App. 10a) that administrative detention "is perhaps the princip[al] remedy available to prison officials when crime or other disturbances threaten the prison environment."

Prison officials place an inmate in administrative detention only upon concluding that "his continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution * * *" (28 C.F.R. 541.22(a)). The reasons for detention include, inter alia, a pending hearing or investigation for a violation of institution regulations or a pending investigation or trial for a criminal act (28 C.F.R. 541.22(a) (1)-(3)). In fact there are frequently several independent and concurrent reasons for keeping an inmate in administrative detention during the period in which he is under criminal investigation. Once prison officials conclude that an inmate has committed a murder, they may believe it necessary to segregate him in order to protect prison staff members and other inmates, regardless of whether a criminal investigation is pending.¹⁹ Such inmates are likely to be among the most dangerous in the prison system, and prison officials would be remiss in failing to take protective measures that may include administrative detention. In addition, an inmate who has been found by prison officials to have committed a violent prison crime may be held in administrative detention pending transfer to a higher security level institution when space permits. See 28 C.F.R. 541.22(a) (4).

Consistent with the regulations, respondents were kept in administrative detention because of the pendency of the criminal investigation of the murders they were suspected of committing and also because of prison officials' belief that their "[c]ontinued presence * * * in the general population [would] pose[] a serious threat" to other inmates "and to the security

¹⁹ See, e.g., Tr. 1214-1215 (respondent Reynoso's statement that if prison authorities were only going to deprive him of 20 days' good time for his role in the murder, he would kill again).

of the institution" (J.A. 10, 12, 138, 139). See pages 3-4 note 2, 7-8 *supra*. Respondents Mills, Pierce, Gouveia and Ramirez presumably were kept in administrative detention for the additional reason that they were pending transfer to another penal institution. See Pet. App. 44a; J.A. 33-34, 46-47, 130.²⁰

Even if respondents had been segregated from the general prison population for the sole reason that they were pending criminal investigation, it is abundantly clear that such detention cannot be equated with accusation for Sixth Amendment purposes. This Court has recognized that segregation of inmate-suspects from the general prison population pending investigation of prison offenses serves important security purposes, especially the protection of potential witnesses. In *Hewitt v. Helms*, No. 81-638 (Feb. 22, 1983), slip op. 12 (citations omitted), the Court stated:

The safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration. Likewise, the isolation of a prisoner pending investigation of

²⁰ In their briefs in opposition Segura and Ramirez suggest that they were segregated from the general prison population for punitive reasons following their prison disciplinary hearings. Segura Br. in Opp. 8; Ramirez Br. in Opp. 5. If that were so it would not affect the conclusion that there nevertheless as yet existed no criminal prosecution in which they were entitled to appointment of counsel. This Court has made clear that there is no right to counsel in connection with prison disciplinary proceedings. See *Baxter v. Palmigiano*, 425 U.S. 308, 314-315 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 569-570 (1974). See also *United States v. Mills*, 704 F.2d at 1557 (even when its purpose is "entirely punitive," prison segregation is not equivalent to the onset of accusatory judicial proceedings). In fact, however, the record is unclear as to whether respondents' detention was imposed in part for disciplinary reasons or solely for administrative purposes (i.e., because of the pending investigation and security concerns).

misconduct charges against him serves important institutional interests relating to the insulating of possible witnesses from coercion or harm.

It went on to note that the state "must protect possible witnesses—whose confinement leaves them particularly vulnerable—from retribution by the suspected wrongdoer, and, in addition, has an interest in preventing attempts to persuade such witnesses not to testify at disciplinary hearings" (*id.* at 14-15). See also *id.* at 16 n.9 (noting that pendency of a state criminal investigation was a factor properly taken into account in continuing administrative detention).

These concerns are by no means trivial. In the *Gouveia* case, the prosecutor informed the district court that he was reluctant to turn over to the defense a month before trial the names of six inmate-witnesses whose testimony the government planned to present, since three of the six had been the objects of attempted murders when it became known that they were interested in cooperating with the government. See Aug. 18, 1980, Hearing Tr. 27-28.²¹

²¹ In the *Mills* case an inmate called as a defense witness refused to testify, apparently because he believed a recent attempt on his life was related to the testimony he might give (*Mills* Tr. 1071-1079). In addition, there is evidence that members of the Aryan Brotherhood, to which respondent *Mills* sought admission (*Mills* Tr. 562-563), have sworn, among other anti-social undertakings, to perjure themselves on behalf of fellow members who may be prosecuted. See *United States v. Abel*, 707 F.2d 1013, 1016 (9th Cir. 1983), petition for cert. pending, No. 83-935 (filed Dec. 6, 1983). Brotherhood members apparently attempt to prevent others from testifying against their members as well. In one case an inmate was so fearful of appearing as a prosecution witness in a murder trial involving a member of the Brotherhood that he feigned suicide in order to obtain special protection from the government. See *United States v. Mills*, 704 F.2d at 1560. See also *United States v. Castillo*, 615 F.2d 878, 885 (9th Cir.

Plainly the administrative detention of inmate-suspects pending a criminal investigation does not constitute some sort of symbolic "accusation"; the heart of the rationale for such detention is practical—protection of potential inmate-witnesses from intimidation and prevention of subornation of perjury.

The court of appeals attempted to bolster its analysis by drawing an analogy between administrative detention of an inmate and arrest of a suspect outside prison. The court noted (Pet. App. 12a-13a) that outside prison a suspect who is arrested and detained must appear before a magistrate without unnecessary delay and that such a suspect would be guaranteed the assistance of counsel at the time of that appearance. But it is not arrest and detention by law enforcement authorities that triggers the Sixth Amendment right to counsel; rather, it is the decision by prosecutors to initiate formal adversary judicial proceedings.²² "An arrest on probable cause without a warrant, even though that arrest is for the crime with which the defendant is eventually charged, does not initiate adversary judicial criminal proceedings * * *." *Caver v. Alabama*, 577 F.2d 1188, 1195

1980) (suspect in a prison murder case attacked an inmate who had cooperated with the FBI investigation of the murder).

²² Moreover, even when an attorney is appointed for a defendant in connection with a particular event that takes place following indictment, that attorney's responsibilities do not routinely extend to investigation and preparation of the defense. See *United States v. Daly*, 716 F.2d 1499, 1504-1505 (9th Cir. 1983), in which the court noted that counsel had been explicitly appointed to represent the defendant at a bail hearing following indictment. The court held that under the Speedy Trial Act, the 30-day period between appearance through counsel and trial begins to run only after the defendant has first appeared with counsel who has been engaged or appointed to represent him at trial.

(5th Cir. 1978). See also *Kirby v. Illinois*, *supra* (no right to counsel at preindictment show-up following arrest); *Lomax v. Alabama*, 629 F.2d 413, 415-416 (5th Cir. 1980), cert. denied, 450 U.S. 1002 (1981) (arrest with or without a warrant falls far short of an official accusation by the state that would trigger a right to counsel for the arrested individual).

The court of appeals invoked cases involving the Sixth Amendment right to a speedy trial in support of its arrest analogy. See Pet. App. 7a-8a, 24a-25a. But the decisions in those cases make clear that the speedy trial right is not triggered merely by arrest or detention; instead, both arrest *and* holding to answer a criminal charge (which is necessary if authorities are to continue to hold a suspect) are required in order to engage the right to a speedy trial. See *United States v. MacDonald*, 456 U.S. 1, 7 (1982) ("no Sixth Amendment right to a speedy trial arises until charges are pending"); *id.* at 8-9 (speedy trial guarantee inapplicable once charges are dismissed); *United States v. Marion*, 404 U.S. 307, 320 (1971) ("it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge" that engage the right to a speedy trial); *id.* at 321 (referring to a defendant who "has been arrested and held to answer"). Cf. *Dillingham v. United States*, 423 U.S. 64 (1975). Respondents were not held to answer a criminal charge until they were indicted. See *United States v. Duke*, 527 F.2d at 389-390 (for purposes of speedy trial analysis, defendant was not "charged" with a crime while he was in administrative segregation).²³ Thus, the court of appeals' analogy to an in-

²³ The courts of appeals have held uniformly that segregation from the general prison population does not trigger the Sixth Amendment right to a speedy trial. See *United States v. Mills*, 704 F.2d at 1556-1577; *United States v. Daniels*, 698

dividual arrested outside the prison setting is simply inadequate to support its creation of a right to counsel.

C. Respondents' Allegations That They Were Deprived of the Opportunity to Investigate and Prepare an Effective Defense Do Not Support a Departure From the Longstanding Principle Governing Attachment of the Sixth Amendment Right to Counsel

As we have shown above, the general principle that Sixth Amendment assistance of counsel rights do not attach prior to the institution of formal judicial proceedings is well settled. The question here is whether the court of appeals was correct in carving out an exception—impossible to discern in the constitutional text—for prisoner suspects segregated from the general prison population for more than 90 days.

The court of appeals did not hold that indigents suspected of crimes must generally be appointed counsel under the Sixth Amendment—although such action would doubtless be of some value to their ability to mount an effective defense in the event they are ultimately charged. Nor did it find such a right for incarcerated indigent suspects as a class. Each of these in turn might be seen as logical developments growing out of the court of appeals' initial departure from the general Sixth Amendment rule, but at this juncture they so manifestly contradict the basic principles laid down by this Court that they were doubt-

F.2d 221, 223 (4th Cir. 1983); *United States v. Blevins*, 593 F.2d 646, 647 (5th Cir. 1979); *United States v. Bambulas*, 571 F.2d 525, 527 (10th Cir. 1978); *United States v. Clardy*, 540 F.2d at 441; *United States v. Duke*, 527 F.2d at 389-391. Despite its reliance on concepts developed in speedy trial cases, the court of appeals here found inapposite its own holding in *Clardy* that segregation of prison inmates does not trigger the right to a speedy trial. See Pet. App. 14a.

less recognized to be beyond the innovative powers of a lower court.²⁴

²⁴ This Court has never suggested that a constitutional right to counsel attaches prior to initiation of adversary judicial proceedings whenever an individual lacks investigative resources or otherwise faces obstacles to investigation. In fact, to the extent this Court's decisions touch on the subject of investigation, they suggest the absence of any such right. See, e.g., *Morris v. Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 9 ("Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a Sixth Amendment right to counsel"); *United States v. Ash*, 413 U.S. at 317-318 (right to counsel applies to trial-like confrontations, not to prosecutor's investigations or interviews with witnesses); *United States v. Wade*, 388 U.S. 218, 227-228 (1967) (government analyses of evidence are not critical stages of a prosecution at which the accused has the right to presence of his counsel); *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (noting that the Constitution "nowhere specifies any period which must intervene between the required appointment of counsel and trial"). See also *United States v. Mandujano*, 425 U.S. at 581 (opinion of Burger, C.J.) (witness before a grand jury does not have a Sixth Amendment right to counsel); *United States v. Ciampaglia*, 628 F.2d 632, 639 (1st Cir.), cert. denied, 449 U.S. 956 (1980) (government was not required to time the return of an indictment so the right to counsel would attach to the investigatory stage of the proceedings); *United States v. Bennett*, 409 F.2d 888, 900 (2d Cir.), cert. denied, 396 U.S. 852 (1969) (right to counsel cases do not suggest that counsel must be present when the prosecution is interrogating witnesses in the defendant's absence).

This Court has noted that counsel must be appointed sufficiently in advance of trial to permit "the giving of effective aid in the preparation and trial of the case" (*Powell v. Alabama*, 287 U.S. at 71). But the Court in *Powell* was referring to preparation during the period following initiation of adversary judicial proceedings. See *Kirby v. Illinois*, 406 U.S. at 688-689. There is no claim in this case that respondents' counsel had insufficient time to prepare for trial following their appointments. Counsel for the *Gouveia* respondents were appointed at the arraignments on July 14, 1980. The

Here, the triggering event was solely the retention of an inmate in segregated status for a period in excess of 90 days. Had respondents been released into the general prison population at that juncture, the court of appeals would have found no constitutional right to appointment of counsel. In assessing the need for preindictment counsel in this case, therefore, the critical focus cannot be on the benefits that appointment of counsel might have afforded to the presentation of a defense at trial, but solely on the differences between custody in administrative segregation and custody in the general prison population for purposes of preparing a defense against charges that have not yet been preferred. In evaluating this matter, we think the court of appeals doubly erred: it underestimated the opportunities available to inmates in segregation to take steps to preserve favorable evidence; and it exaggerated the likelihood that inmates released to the general prison population would take material, legitimate actions to gather evidence that would be unavailable if they remained in segregation. Realistically viewed, these differences are not of such consequence as to justify the departure from settled Sixth Amendment principles undertaken by the court of appeals.²⁵

first trial (which resulted in an acquittal of co-defendant Flores on all counts, an acquittal of respondent Reynoso on the weapons conveyance count, and a mistrial as to all other charges) began on September 16, 1980, and the retrial began on February 17, 1981. Counsel for the *Mills* respondents were appointed at the arraignments on April 21, 1980. Following dismissal of the indictment and an interlocutory appeal, the trial finally was held in January 1982. See Pet. App. 4a-5a; J.A. 1, 120.

²⁵ In devising this novel right to counsel the court of appeals purported to achieve "a proper balance of the interests of both prison officials and inmates suspected of crime" (Pet. App. 18a). But the court can hardly be said to have given

In assessing the court of appeals' conclusions regarding an inmate-suspect's need for the assistance of counsel in the preindictment period, it is important to recall, as an initial matter, that there are natural obstacles to preparation of any criminal case during the preindictment period—obstacles that affect both the prosecution and the defense and that exist in connection with nonprison crimes as well as prison crimes. In particular, the passage of time ordinarily makes investigation and preparation of a case more

significant weight to the concerns of prison authorities. As we noted in our petition (at 26-29), implementation of the court's decision would cause significant practical problems. The Bureau of Prisons itself has neither statutory authority nor a source of funding with which to appoint counsel. Thus, district courts presumably would do so pursuant to the Criminal Justice Act of 1964, 18 U.S.C. 3006A(a), on the motion of an inmate, the Bureau of Prisons, or a public defender. Prison officials would have to make arrangements to ensure that preindictment investigation of the type envisioned by the court of appeals could be conducted consistently with the maintenance of order and the conduct of ongoing FBI investigations in the prison. It is unclear from the court's opinion to what extent prison officials could limit investigation by counsel to avoid compromising the identity of inmate-informants or exposing certain individuals to retaliation before prison officials could make arrangements to ensure their safety. As we have suggested at pages 26-29, *supra*, the alternative offered by the court of appeals—release of an inmate suspect into the general prison population after 90 days—would normally be unsatisfactory because of security concerns.

The record in this case does not indicate that respondents applied to a district court for appointment of counsel. In addition, it appears that only Gouveia and co-defendant Flores (who was acquitted in the first trial in the *Gouveia* case) contacted the Federal Public Defender's office in an attempt to obtain counsel while they were in administrative detention. See J.A. 45; Sept. 8, 1980, Hearing Tr. 67-69. That office informed Flores that it could not represent him until he had been charged in a criminal case (*id.* at 68-69).

difficult. In any criminal case, witnesses may disappear or die, memories may fade, and physical evidence may deteriorate during the preindictment period. These vicissitudes do not in any other context expand the right to appointment of counsel to the preaccusation stage.

In general, these normal obstacles to preindictment investigation work in favor of the defense. That is because the prosecution bears the heavy burden of proving guilt beyond a reasonable doubt in any criminal case. That burden of proof, which represents the basic protection for defendants under our system of criminal justice, largely compensates for the investigative difficulties a suspect may face during the preindictment period, regardless of whether an offense occurs inside or outside prison.

While prison crimes may present some special problems, they are not inevitably more difficult to investigate than nonprison crimes. Depending on the circumstances, nonprison crimes may present serious investigative problems. For example, when an offense has occurred on a busy street and anonymous witnesses have dispersed, both the prosecution and the defense may have great difficulty in conducting an investigation. In addition, as the dissenters noted (Pet. App. 26a),

[e]ven free suspects often lack the investigatory advantages the majority attributes to them. Many law enforcement investigations are confidential and continue for months or years. Like [respondents], the targets in such cases have limited knowledge or none about the investigations.

The dissenters also noted (*ibid.*) that obstacles similar to those respondents faced may confront an individual who is convicted and imprisoned for one crime while investigation for other (nonprison) of-

fenses is underway or an individual whose probation or parole is revoked based on renewed criminal activity. Indeed, in any criminal case it probably will be difficult for an indigent suspect to accomplish the same things a lawyer could in the preindictment period—and there is little basis for supposing that suspects ordinarily attempt their own preindictment investigations. Perhaps, in an ideal world, the government could provide counsel prior to indictment for every indigent suspect who could benefit from such assistance in overcoming investigative difficulties. But no court has ever suggested that the Constitution confers such a wide-ranging entitlement.

In any event, assuming with the court of appeals that the relevant comparison is between administrative detention and the general prison population, the court of appeals appears to have overestimated the incremental impact on the ability to investigate suffered by an inmate who is moved from the general population to administrative detention.²⁶ Any inmate-suspect has certain important opportunities to investigate and preserve the names of witnesses, regardless of whether he is in the general prison population or in administrative detention. An inmate who chooses to attempt to clear himself by providing full information about his activities to FBI investigators will ensure preservation of information concerning witnesses in the form of a detailed FBI report of the interview. See, *e.g.*, J.A. 23-25, 35-37, 53-61.

In addition, normally there will be a prison disciplinary proceeding following any prison offense. In connection with that proceeding prison officials ask

²⁶ Ironically, if, rather than being placed in segregation, respondents had been released from prison soon after the murders in these cases, they would probably have faced even greater obstacles to preparation of a defense than those inherent in administrative detention.

inmate-suspects to list any witnesses who might provide information about whether the inmate participated in the offense. See 28 C.F.R. 541.15(i). Thus, an inmate who is interested in clearing his name can provide information that will be summarized in disciplinary records and thereby preserved; that information would then be available for the inmate to use in a later criminal proceeding. In fact, the inmate can obtain individualized assistance in preparing for a disciplinary hearing. The Bureau of Prisons provides staff representatives to assist inmate-suspects in collecting and presenting evidence in connection with prison disciplinary hearings. Under 28 C.F.R. 541.17(b), the staff representative "shall be available to assist the inmate if the inmate desires by speaking to witnesses and by presenting favorable evidence to the [institution disciplinary committee] on the merits of the charge(s) or in extenuation or mitigation

* * * " 27

Prison disciplinary hearings take place soon after an offense has occurred (see 28 C.F.R. 541.15(b), (k))—within several weeks of the offense in each of these cases (see pages 3, 8, *supra*). Thus, in the period when memories are still fresh, any inmate-suspect can obtain the sort of investigative assistance the court below deemed necessary to preserve the

²⁷ Supplemental guidelines issued by the Bureau of Prisons instruct staff representatives that their duties include: "assist[ing] the inmate in presenting whatever information the inmate wants to present and in preparing a defense;" "speak[ing] to witnesses who might furnish evidence on behalf of the inmate;" and "question[ing] witnesses requested by the inmate who are called [at the hearing]." U.S. Dep't of Justice, Federal Prison System Program Statement No. 5270.5 (Inmate Discipline and Special Housing Units), Ch. 10 at 8 (Aug. 12, 1982)). Copies of Program Statement No. 5270.5 are being lodged with the Court and provided to respondents' counsel.

right to a fair trial in a subsequent criminal prosecution and can preserve information about identities of potential witnesses.²⁸

The court of appeals believed that an inmate-suspect would have no opportunity to identify potential witnesses and to establish their real names unless he were returned to the general prison population within several months of the offense. But even apart from the opportunities for preserving lists of witnesses in connection with disciplinary hearings or FBI interviews, an inmate-suspect in administrative detention is not without means to obtain information. Some inmate-suspects may have been in the general prison

²⁸ Respondent Segura provided the disciplinary committee with the name of a single witness (see J.A. 40), while respondent Gouveia provided the names, or nicknames, of three witnesses (*id.* at 49). Respondent Mills apparently did not provide the names of any witnesses (*id.* at 136). Mills acknowledged that a prison hearing officer gave him an opportunity to provide a confidential list of favorable witnesses, but that he declined that opportunity. See Pet. App. 44a; J.A. 129-130. The record also indicates (*ibid.*) that Mills refused the offer of assistance of a staff representative. There is no indication in the record that the other respondents took advantage of such assistance.

In their briefs in opposition, several respondents suggested that the staff representative could not be useful because he or she is merely a prison guard "more likely to be viewed by the prisoner as a spy for the government." Ramirez Br. in Opp. 8 n.1; see also Mills & Pierce Br. in Opp. 18. But under Bureau of Prisons regulations, the inmate selects the staff representative of his or her choice (see 28 C.F.R. 541.17(b)). The Bureau informs us that the staff representative may well be a social worker or counselor. Moreover, Bureau regulations prohibit the appointment as staff representative of any individual who would have a conflict of interest (*ibid.*). We certainly cannot accept the implicit suggestion that an innocent inmate can reasonably fear that information given to the staff representative would somehow be used to "frame" him.

population for at least part of the time following the offense (as was the case with the *Gouveia* respondents²⁹) and thus would have an opportunity to identify witnesses during that period. Inmates in administrative detention may submit formal requests for assistance to prison staff members and may appeal to the warden of the institution if such requests were denied. See U.S. Dep't of Justice, Federal Prison System Program Statement No. 5511.1 (May 14, 1981).³⁰ If an inmate made clear that such a request was in connection with preparation of his defense to anticipated criminal charges, prison officials could be expected to take steps to obtain and preserve the requested information. In addition, inmates in administrative detention have visitation and telephone privileges, as well as contact with guards, counselors, and other inmates who are in administrative detention on a short-term basis. Communication between inmates in administrative detention and inmates in the general population, either through outsiders or through the "prison grapevine," is not uncommon. Indeed, during the trial in the *Gouveia* case, several inmate-witnesses testified to direct communication between inmates in administrative detention and those in the general population (*e.g.*, through windows or vents or in the visitation area). See Tr. 1215-1216, 1644-1645, 1650-1651, 2427, 2567-2568.

²⁹ Respondents Ramirez and Segura were not placed in administrative detention until December 4, 1978—three weeks after the murder of Trejo; respondents Gouveia and Reynoso were released from detention and returned to the general prison population during the period between November 22 and December 4, 1978. See pages 2-3, *supra*. There is no evidence in the record that respondents took advantage of their relative freedom in these weeks following the murder in order to conduct investigations, determine the identity of potential witnesses, or preserve testimony.

³⁰ Copies of Program Statement No. 5511.1 are being lodged with the Court and provided to respondents' counsel.

On the other side of the coin, an inmate who remains in the general prison population does not have unlimited opportunities to pursue investigations. Such an inmate would not have access to physical evidence in the custody of the FBI and would be unable to perform his own expert analysis of that evidence or to take steps to preserve it.²¹ Inmates in the general prison population have more opportunities for contact with other inmates than do those in administrative detention. However, inmates in the general population do not have unlimited access to any part of the institution; limitations on an inmate's schedule and on his ability to enter units other than his own (see Mills Tr. 223-224) could circumscribe his ability to locate witnesses.²²

Moreover, we question the extent to which most inmate-suspects would conduct legitimate investigations if they were returned to the general prison population. Prison officials would be derelict in their duties if they failed to take into account the possibility that "investigations" by inmate-suspects may take the form of intimidating witnesses and suborning perjury. See pages 27-29 & note 21, *supra*. Depending on the nature of the offense, even if an inmate-

²¹ Respondents Mills and Pierce contended that they were prejudiced by the deterioration of physical evidence, including the healing of their own wounds. See Pet. App. 37a. Even if they had been released to the general prison population immediately after the murder of Hall, they surely could not have prevented the developments of which they complain.

²² The incremental difference between opportunities to investigate in administrative detention, as opposed to the general population, is even less in view of the fact that the court of appeals did not require release of the inmate to the general population for 90 days. To the extent an inmate can conduct useful investigation while in the general population, information is more likely to be available in the first months after commission of an offense than in the later period.

suspect wished to prepare a defense, he might not be able to accomplish much of use before he learned the nature of the government's case against him (i.e., before the indictment is handed down).³³ In this connection, Bureau of Prisons officials have informed us that they are unaware of any instances in which retained counsel have sought access to a prison to conduct an investigation prior to indictment.

Respondents have alleged the existence of numerous missing or deceased witnesses whom they would have identified, or whose testimony they could have preserved, if they had not been in administrative detention during the preindictment period. It is hard to avoid viewing such claims with a certain amount of skepticism. It is, of course, a simple matter for a defendant to invent witnesses known only by nickname, while it is virtually impossible for the prosecution to disprove the existence or alleged usefulness of such hypothetical individuals.³⁴ In addition, a defendant can freely attribute guilt or exculpatory knowledge to any inmate who happens to die prior to trial. Indeed, there are a suspiciously large number of deceased witnesses who were alleged to be critical to the defense in the *Gouveia* case.³⁵

³³ Of course, investigation may be unnecessary, depending on the nature of the inmate's defense. For example, an inmate who claims he was with one other inmate at the time the offense was committed might have relatively little need to conduct an investigation if he knows the identity of that other inmate.

³⁴ The list of unidentified potential witnesses provided by respondent Pierce included the following: "Little Charlie, Henry's Kid, Hat, Dollars, Crow Dog, Buzzard, Indian, Droopy, The Hippie, Sluggo, Ole, Mouse, Cowboy, Fast Freddie and Weasel" (J.A. 150). Respondent Ramirez identified four potential alibi witnesses as "'Abalone', 'Jose', 'Paharo', and 'Jesus R.C.' " (*id.* at 34).

³⁵ See, e.g., J.A. 78 (citing three deceased witnesses who allegedly would have testified for respondent Segura).

To the extent an inmate-suspect (whether he has been in administrative detention or in the general population) has been unable to gather information prior to indictment, his counsel nevertheless is not without resources with which to trace potential witnesses once an indictment has been returned. Because of the controlled conditions of prison life, the number of potential witnesses to a prison crime normally is limited to the inmates and staff members assigned to the institution who have access to the area in which the crime occurred or in which the inmate claims to have been at the time of the crime. Although the transient nature of a prison population may complicate efforts to identify and locate witnesses, an institution may be able to provide inmate rosters that would help a defendant recall names of potential witnesses. Inmate photographs may be available to assist defendants who claim that they cannot recall names of potential witnesses or that they know only prison nicknames. The Bureau of Prisons locator system or local probation offices may be able to provide information on the location of potential witnesses who have been transferred to a different institution or released. See 28 C.F.R. 2.40(a)(4) (requiring parolees to notify their probation officers of changes in residence); J.A. 65-78. In addition, defendants may obtain substantial assistance from discovery of exculpatory information in the government's possession. See, e.g., *Brady v. Maryland* 373 U.S. 83 (1963); Fed. R. Crim. P. 16(a)(1). In this case, respondents were able to take advantage of several of these possibilities.³⁶ Indeed, there is nothing in the record to dis-

³⁶ For example, the *Gouveia* respondents received copies of transcripts of interviews the FBI had conducted with them following the murders. See, e.g., J.A. 23-25, 35-37, 53-61. *Gouveia's* counsel used such a transcript to determine the identities of six potential witnesses. See J.A. 65. In addition,

prove the conclusion (and respondents never suggested otherwise) that by the time of trial they had located every potential witness of any significance whom they had been unable to find at the time of the pretrial motions. See pages 56-58, *infra*.

Again, we stress that an inmate-suspect in administrative detention has the ultimate advantage in a later criminal proceeding—the prosecution's burden of proving guilt beyond a reasonable doubt. Furthermore, it is worth noting that the prosecution itself faces significant hurdles in investigating prison crime, including difficulty in obtaining cooperation from inmate-witnesses and a shortage of witnesses whom a jury is likely to find credible. See, e.g., *Mills Tr.* 720-721, 781-782, 851-852, 1441-1445. See also *United States v. Mills*, 704 F.2d at 1557 (death of key witnesses was prejudicial to both defense and prosecution); *United States v. Clardy*, 540 F.2d at 442.

We do not suggest that inmate-suspects would never have a remedy in cases like these. If an inmate could show that prison officials wrongly interfered with his good faith efforts to preserve a defense (for instance, by refusing to make a record of potential witnesses suggested by the inmate at the time of the disciplinary hearing) and that he suffered actual and specific prejudice from such failure, perhaps the in-

the *Gouveia* respondents requested and obtained rosters of inmates assigned to the unit at Lompoc in which the murder of Trejo occurred. See J.A. 64, 66, 70-77. They also received unit rosters for other cellblocks and a roster listing inmates who had arrived shortly before the murder took place. See J.A. 64, 67. Several respondents apparently found the rosters unhelpful because they did not bear dates of the week of the murder and listed inmates only by last name and prison number. See, e.g., Reynoso Br. in Opp. 7; J.A. 21. However, counsel for *Gouveia* acknowledged that he was able to determine the whereabouts of four alibi witnesses by using the prison locator system and inmate records. See J.A. 65.

mate could assert a due process claim. Compare, *e.g.*, *United States v. Ash*, 413 U.S. at 320 (proper safeguard against abuses during pretrial photographic display is not expansion of the right to counsel but rather prosecutor's ethical responsibility and review under the Due Process Clause); *Kirby v. Illinois*, 406 U.S. at 690-691 (proper safeguard against prejudicial procedures at a preindictment lineup is review under the Due Process Clause). See also *United States v. Lovasco*, 431 U.S. 783, 789-790 (1977) (due process inquiry into reasons for delay and prejudice to accused is appropriate in cases involving claims of preindictment delay); *United States v. Marion*, 404 U.S. 307, 324 (1977). But there is no indication in this case that prison officials refused to cooperate with legitimate attempts by respondents to preserve a defense. Rather, to the extent the record speaks to this point, it appears that prison officials and FBI investigators urged respondents to provide information that would clear them of suspicion. See, *e.g.*, J.A. 35, 129-130. It is respondents themselves who declined to take opportunities offered to them to preserve their defenses. See, *e.g.*, J.A. 56, 129-130, 136. Thus, there could be no basis for a finding that any constitutional right of respondents was violated.

II. ASSUMING ARGUENDO THAT RESPONDENTS HAD THE RIGHT TO APPOINTMENT OF COUNSEL AFTER BEING HELD IN ADMINISTRATIVE DETENTION FOR 90 DAYS PENDING A CRIMINAL INVESTIGATION, DISMISSAL OF THE INDICTMENTS WAS AN INAPPROPRIATE REMEDY IN THE ABSENCE OF ANY SHOWING OF ACTUAL AND SPECIFIC PREJUDICE

Even if the Court should conclude that respondents had a right to appointed counsel during the time they were in administrative detention, the court of appeals erred in ordering dismissal of the charges. The court decided (Pet. App. 20a-23a) that dis-

missal of the indictments was the only possible remedy for prejudice respondents may have suffered as a result of the failure to have appointed counsel at the preindictment stage. It concluded (*id.* at 22a) that the failure to appoint counsel created a "potential of substantial prejudice" that was sufficient to warrant dismissal of the indictments or, alternatively, that it was appropriate to presume prejudice in the prison setting. The court's opinion reflects no analysis of the trial records to determine whether they confirmed or disproved the respondents' allegations of prejudice. Rather, the court based its conclusion that substantial prejudice "may have occurred" (*ibid.*) on respondents' general assertions of prejudice and on the pretrial conclusions of the district court that had dismissed the indictment in the *Mills* case (conclusions a panel of the court of appeals found to be insufficient to support dismissal on the ground of preindictment delay (*id.* at 35a-38a)).

A. This Court's Decisions Establish That Dismissal of the Indictment Is Not a Proper Remedy for Violation of the Right to Counsel in the Absence of a Showing of Actual and Specific Prejudice

This Court has noted that dismissal of the indictment is a drastic remedy that is rarely appropriate, even in the case of constitutional violations. See, *e.g.*, *United States v. Blue*, 384 U.S. 251, 255 (1966). The court of appeals' dismissal of the indictments in this case on the basis of potential or presumed prejudice is clearly inconsistent with this Court's decision in *United States v. Morrison*, *supra*. The Court there stated that in right to counsel cases "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation [of the Sixth Amendment right to counsel] may have been deliberate." 449 U.S. at 365. The Court instructed that "remedies

should be tailored to the injury suffered from the constitutional violation" and that the proper approach in right to counsel cases is to identify and neutralize any taint "by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial" (*id.* at 364, 365). Although the court of appeals purported to abide by the teachings of *Morrison* (Pet. App. 20a, 22a), its treatment of prejudice cannot be reconciled with the reluctance to allow dismissal of serious criminal charges evinced by that decision.

The court of appeals seized on this Court's reference in *Morrison* (449 U.S. at 365) to the possibility that dismissal of the indictment might be an appropriate remedy if there were a "substantial threat" of "demonstrable prejudice." The court of appeals reformulated these terms and concluded that dismissal would be proper when the failure to appoint counsel "creates the potential of substantial prejudice" (Pet. App. 22a). But that formulation is not the same as the standard of *Morrison*; rather, *Morrison* makes clear that dismissal of the indictment is an extraordinary remedy that should be confined to cases in which prejudice is concrete, substantial, and irremediable by less drastic means. Moreover, *Morrison* would seem to require a case-specific analysis of prejudice, rather than a presumption, whenever possible.³⁷

³⁷ We argue in our brief in *United States v. Cronic*, No. 82-660, and in our brief as amicus curiae in *Strickland v. Washington*, No. 82-1544, that in cases involving claims of ineffective assistance of counsel a court must assess whether the defendant was prejudiced in a manner that probably affected the outcome of the trial. See, e.g., *Morris v. Slappy*, *supra*, slip op. 9-10; *United States v. Decoster*, 624 F.2d 196, 208 (D.C. Cir.) (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979). Respondents' claims that they were unable to conduct adequate investigations and to present exculpatory evidence because of the failure to appoint counsel

The court of appeals concluded that a presumption of prejudice would be appropriate in the case of inmate-suspects in administrative detention "because ordinarily it will be impossible adequately either to prove or refute its existence," so that it would be necessary to "tip the scales in favor of the locked away accused" in order to vindicate the right to counsel (Pet. App. 22a). But this Court has made clear that the lower courts normally must make case-by-case evaluations to determine whether constitutional violations have resulted in a degree of actual prejudice that would justify dismissal of the indictment. The sort of prejudice claimed by respondents—dimmed memories, inaccessible witnesses, and lost evidence—is most similar to that involved in claims of prejudice resulting from preindictment delay in violation of the Due Process Clause. See *United States v. Marion*, 404 U.S. at 325-326. The analysis of prejudice in such cases normally is not an easy task, since it may be difficult to be certain of just what evidence a defendant could have produced in the absence of the alleged constitutional violation. But this Court's decisions require such an analysis, even when the prosecutor has deliberately and unfairly delayed an indictment in order to secure a tactical advantage at trial. See *United States v. Lovasco*, 431 U.S. at 790. We find it difficult to understand why the court of appeals deemed it necessary to dispense with such a case-specific inquiry in the right to counsel context.

The court of appeals suggested that dismissal of the indictments was the only adequate remedy in cases like these because "[p]rison crimes present suspects with unique investigatory and evidentiary

in the preindictment period are not unlike claims of ineffective assistance of counsel. See Pet. App. 21a.

obstacles" (Pet. App. 20a). But as we explained above, defendants who have been in administrative detention in the preindictment period are nevertheless not without means of identifying potential sources of favorable information. A court that evaluates prejudice from the lack of appointed counsel during administrative detention should consider, *e.g.*, the opportunities for investigation and preservation of information afforded to a defendant in connection with the prison disciplinary proceeding (including the assistance of a staff representative), the amount of time a defendant may have spent in the general prison population following the offense before being placed in administrative detention, and the information a defendant's counsel may have received in the form of inmate rosters and photographs or discovery of exculpatory information in the government's possession. In addition, the court should consider the extent to which a defendant would have benefited from appointment of counsel in light of the nature of his defense, as well as the strength of the prosecution's case. Such considerations may establish that a particular defendant has not been prejudiced by the "unique investigatory and evidentiary obstacles" the court of appeals perceived.

Moreover, a court must analyze prejudice in light of the record made at trial.³³ This Court has indicated that evaluations of prejudice arising from alleged constitutional violations generally are best made from

³³ It appears that none of the respondents renewed and supplemented their motions to dismiss the indictments following trial. Rather than arguing that their pretrial contentions of inability to prepare a defense had been borne out by their experience at trial, respondents continued to rely primarily on general contentions of prejudice. In view of the extensive defenses respondents were able to present at trial (see pages 56-59, *infra*), it is understandable that they preferred not to argue from a post-trial perspective.

a post-trial perspective. For example, in *United States v. MacDonald*, 435 U.S. 850 (1978), the Court held that a defendant may not take a pretrial appeal based on an alleged violation of his Sixth Amendment right to a speedy trial. It explained that "[b]efore trial * * * an estimate of the degree to which delay has impaired an adequate defense tends to be speculative" and that "[n]ormally, it is only after trial that that claim may fairly be assessed" (*id.* at 858, 860).³⁰ Such reasoning applies with equal force to right to counsel cases. Most obviously, a defendant who is acquitted (as was co-defendant Flores in the first *Gouveia* trial, despite the fact that he had been in administrative detention or at another institution during most of the preindictment period, see J.A. 8-9) cannot be said to have suffered prejudice. In evaluating allegations of prejudice in other cases, a court should consider, *e.g.*, the nature of the testimony of witnesses the defendant presented at trial. If the testimony of alleged missing or deceased witnesses would have been cumulative to the testimony of witnesses who appeared, the court may not conclude that the defendant was seriously prejudiced by the inability of counsel to locate every possible potential witness. See, *e.g.*, *United States v. Tempesta*, 587 F.2d 931, 933-934 (8th Cir. 1978), cert. denied, 441 U.S. 910 (1979).

The court of appeals' willingness to forgo a post-trial, case-specific analysis and to presume prejudice fails to give adequate consideration to "society's in-

³⁰ See also *United States v. Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 15, in which the Court noted that where the government places a percipient witness beyond the reach of process "judges may wish to defer ruling on motions until after the presentation of evidence," since determinations of materiality for the purpose of assessing prejudice "are often best made in light of all of the evidence adduced at trial."

terest in the administration of criminal justice" and to whether the relief it fashioned did "not unnecessarily infringe on competing interests" (*United States v. Morrison*, 449 U.S. at 364). See also *Rushen v. Spain*, No. 82-2083 (Dec. 12, 1983) (per curiam), slip. op. 3-4; *United States v. Hasting*, No. 81-1463 (May 23, 1983), slip op. 7; *United States v. Blue*, 384 U.S. at 255. The court of appeals gave no serious consideration to the availability of other remedies that might help overcome the alleged prejudice in a given case.⁴⁰ In addition, it failed to acknowledge the serious practical consequences that would flow from dismissal of the indictments in this and similar cases. As we pointed out in our petition (at 29), violent prison crimes have become a serious threat to the security of both federal and state prisons in recent years. The remedy prescribed by the court of appeals allows especially dangerous individuals who have committed serious prison crimes to escape criminal penalties entirely. Such consequences only reinforce the conclusion that, assuming the court of appeals was correct in creating a right to counsel in the circumstances of this case, no court should dismiss an indictment in such a case unless a searching assessment of the record reveals that a defendant suffered such serious actual prejudice that he can be said to have been denied a fair trial.

B. The Record in This Case Refutes the Court of Appeals' Conclusion That Prejudice Must Be Presumed in the Prison Setting

The record in this case illustrates well why the court of appeals' generalizations about the prison

⁴⁰ As the dissenters noted (Pet. App. 28a-29a), there are remedies short of dismissal of the indictment (including cross-examination, argument to the jury, and instructions concerning missing evidence) that can mitigate possible prejudice in cases like this one.

setting do not support a presumption of prejudice from the failure to appoint counsel during the period of administrative detention. Even respondents' pretrial allegations were inadequate to establish a probability of concrete prejudice sufficient to warrant dismissal of the indictments. Assuming their allegations had been sufficient, the evidence respondents were able to offer at trial disproved their contention that lack of appointed counsel at the preindictment stage deprived them of a fair trial.

1. As a preliminary matter, we note that respondents' pretrial allegations did not establish a probability that they would suffer the sort of prejudice that would warrant dismissal of the indictments. As noted above, the harm that respondents alleged—missing or deceased witnesses, dimmed memories, and deterioration of physical evidence—is similar to the sort of alleged prejudice considered by courts in connection with claims of preindictment delay motivated by bad faith tactical considerations. See *United States v. Lovasco*, 431 U.S. at 796-797; *United States v. Marion*, 404 U.S. at 325-326. Thus, in the absence of any precedent for assessing prejudice resulting from the lack of appointed counsel in the preindictment period, it seems most appropriate to measure respondents' allegations against the standards courts apply in the preindictment delay cases.

The court of appeals concluded that substantial prejudice "may have occurred" in this case because the government was unable to "rebut convincingly" respondents' showing of potential prejudice (Pet. App. 22a). But that approach improperly shifts the burden of proof, which should rest on respondents to demonstrate actual prejudice. A defendant who alleges loss of a witness as a result of preindictment delay bears the burden of establishing what the alleged missing witness's testimony would have been

and how it would have helped his defense. "The mere allegation that [a missing witness] could have testified for the defendant does not establish that he would have so testified or that his testimony would have been helpful." *United States v. Pino*, 708 F.2d 523, 528 (10th Cir. 1983).⁴¹

Respondents' allegations that missing witnesses would have provided favorable testimony do not meet that standard. For example, counsel for respondent Segura alleged that he was unable to present the

⁴¹ See also, e.g., *United States v. Jenkins*, 701 F.2d 850, 855 (10th Cir. 1983) (vague and conclusory allegations of prejudice resulting from the passage of time and absence of witnesses are insufficient to constitute showing of actual prejudice); *United States v. Surface*, 624 F.2d 23, 25 (5th Cir. 1980) (bald assertion that missing witness would have testified favorably to defense, without extrinsic support, was not adequate to show actual prejudice); *United States v. D'Andrea*, 585 F.2d 1351, 1356 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979) (absent substantial identification of the way in which missing witnesses' testimony would have aided the defense, claims of prejudice were too speculative to satisfy the requirement of actual prejudice); *United States v. King*, 560 F.2d 122, 130 (2d Cir.), cert. denied, 434 U.S. 925 (1977) (absent ability to say with specificity or assurance what deceased witness would have said and how his testimony would have aided the defense, no basis for claim of prejudice); *United States v. Mays*, 549 F.2d 670, 679-680 (9th Cir. 1977) (claim of exculpatory testimony by missing witnesses was inadequate when based only on speculation and "self-serving" affidavits of defendants); *United States v. Avalos*, 541 F.2d 1100, 1108 (5th Cir. 1976), cert. denied, 430 U.S. 970 (1977) (conclusory allegations concerning loss of potential defense witnesses insufficient). And see *United States v. Valenzuela-Bernal*, slip op. 14 (under either the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment, a defendant cannot establish that the government's deportation of known percipient witnesses deprived the defendant of a fair trial "unless there is some explanation of how their testimony would have been favorable and material").

testimony of several alibi witnesses due to the death of some and the inability to locate others. He admitted, however, that he did not know "to what degree they would be valuable witnesses" (J.A. 81; see also J.A. 27).⁴² Respondent Mills alleged that the passage of time prevented him from locating witnesses known only by nicknames who could support his alibi that he was in the prison mess hall at the time of the murder, while respondent Pierce speculated that unidentifiable witnesses "might" have presented testimony that would have helped him in formulating a defense (Pet. App. 36a-37a).⁴³ But as the panel in the *Mills* case pointed out (*id.* at 37a), there was no

⁴² Counsel for Ramirez stated that one individual Ramirez allegedly had seen in the prison gymnasium at the time of the murder had died and that others could not be located (J.A. 84; see also J.A. 34). But he presented no evidence that the missing witnesses would have testified that they had seen Ramirez at the time the murders were committed. Counsel for Gouveia alleged that, because of the transfer or release of some inmates and the inability to locate others known only by prison nicknames, he was unable to find several inmates who may have seen Gouveia at the time of the murder and one "theoretical percipient witness to the murder" itself (J.A. 91). But he made no showing that the potential witnesses would have presented evidence favorable to the defense if called to testify. Counsel for Reynoso alleged prior to trial that two potential alibi witnesses had died and that several others could not be located (J.A. 21), but he never proffered any assurance that the missing witnesses could have provided favorable testimony.

⁴³ Counsel for Pierce also alleged that several potential alibi witnesses were reluctant to testify out of apprehension that, because of dimmed memories, they might present incorrect testimony and thereby subject themselves to charges of perjury (J.A. 152-154). He acknowledged, however, that his allegations were based only on his personal belief that the potential witnesses could present favorable evidence and were reluctant to testify because of their uncertainty about specific details. See *id.* at 153.

evidence to support Mills' contentions other than his self-serving affidavit, and Pierce's speculation that missing witnesses "might" have been useful did not show actual prejudice.⁴⁴

Several respondents also alleged that the recollections of potential defense witnesses had dimmed because of the passage of time and that the potential witnesses were unable to recall the details of their activities. See, e.g., Pet. App. 20a, 36a; J.A. 116-117, 153-154.⁴⁵ But in cases involving claims of pre-indictment delay it is settled law that the general claim that memories have dimmed because of the passage of time is not the sort of substantial actual prejudice that constitutes a predicate for reversal. See, e.g., *United States v. Marion*, 404 U.S. at 325-326; *United States v. Rogers*, 639 F.2d 438, 441 (8th Cir. 1981); *United States v. Elsbey*, 602 F.2d 1054, 1059 (2d Cir.), cert. denied, 444 U.S. 994 (1979); *United States v. Avalos*, 541 F.2d 1100, 1108 (5th Cir. 1976). As the Seventh Circuit explained in *United States v. Cowesen*, 530 F.2d 734, 736, cert. denied, 426 U.S. 906 (1976):

⁴⁴ The panel also noted (Pet. App. 36a) that "[p]rison nicknames do not erase the element of speculation. There was no showing that these nicknames were recorded and actual identities or the existence of the witnesses could not be associated with any certainty."

⁴⁵ It seems to us inherently implausible that witnesses who would have remembered enough to support respondents' alibis 90 days after the murders would later have forgotten. Several respondents filed declarations stating that other inmates normally are well aware that an inmate has been segregated from the general prison population because he has been found in a disciplinary hearing to have murdered another inmate (J.A. 18, 134). Surely an individual who knew that the inmate-suspect in fact had an alibi for the time of the murder, and thus had been wrongly identified as the murderer, would recall that information clearly for at least several years.

A claim of faded memory, the veracity of which can rarely be satisfactorily tested, can be plausibly asserted in almost any criminal case in which the defendant is not charged within a few weeks, at most, after the crime * * *. If the limitation period for prosecution were measured by the length of the defendant's memory of routine events, few crimes could be prosecuted.

See also *United States v. Juarez*, 561 F.2d 65, 68-69 (7th Cir. 1977) (faded memory claim is inherently speculative as to its impact on a given case). To the extent a particularized showing that the failure to recollect specific facts due to the passage of time may provide a basis for a claim of prejudice (see, e.g., *United States v. Mays*, 549 F.2d 670, 680 (9th Cir. 1977)), the defendant must demonstrate specifically how the forgotten testimony would have aided his cause in some substantial way. See *United States v. Jenkins*, 701 F.2d 850, 855 (10th Cir. 1983); *United States v. D'Andrea*, 585 F.2d 1351, 1356 (7th Cir. 1979), cert. denied, 440 U.S. 983 (1979). But respondents neither established that any alleged lack of recollection resulted from the passage of time nor identified how any specific information would have materially assisted their defense if witnesses had been able to recall it at the time of trial.⁴⁶

⁴⁶ For example, in his opening brief in the court of appeals (at 12), respondent Gouveia simply alleged that several defense witnesses could not recall certain unspecified facts and had to rely on habit evidence in order to answer counsel's questions about their activities on the day of the murder of Trejo. As an example, Gouveia stated in his reply brief (at 6-7) that one Tony Estrada could not remember the television program he had been watching at the time of the crime. But Gouveia made no showing that such information was relevant or that it would have materially aided his defense had it been within Estrada's recollection.

Finally, respondents Mills and Pierce maintained that they were prejudiced because of the loss of physical evidence due to the lapse of time following the murder of Hall. Mills and Pierce pointed to the deterioration of bloodstains on clothing, the healing of wounds and bruises on their bodies, and the destruction of prison records by government employees (see, e.g., Mills & Pierce Br. in Opp. 4; Pet. App. 37a). Since their release from detention after 90 days could not conceivably have aided them in preserving such evidence, this factor cannot possibly be considered in support of a claim of prejudice. Moreover, as the panel observed (*ibid.*), absent any evidence of deterioration rates or the point at which the prison documents allegedly were destroyed, it is entirely speculative whether the losses resulted from the passage of time prior to appointment of counsel or whether the evidence would have been unavailable to the defense even if the government had returned an indictment within a month of the murder.⁴⁷

2. Even if respondents' allegations of prejudice had established a *prima facie* case that they were in danger of being deprived of a fair trial because of the lack of appointed counsel in the preindictment period, that proposition was disproved by the evidence respondents in fact offered at trial. For example, the *Gouveia* respondents asserted that, because of the passage of time, they would be unable to locate and present the testimony of witnesses who could verify their whereabouts at the time the murders were committed. But at trial they presented the testimony of 14 alibi witnesses (Pet. App. 28a). Five witnesses corroborated Segura's testimony that he

⁴⁷ See also *United States v. MacDonald*, 632 F.2d 258, 269-270 (4th Cir. 1980) (Bryan, J., dissenting), rev'd, 456 U.S. 1 (1982); *United States v. Walker*, 601 F.2d 1051, 1057 (9th Cir. 1979).

was playing handball in the morning and that at the time the murder was committed he was playing pool and watching a football game on television (*e.g.*, Tr. 1568-1569, 1579-1590, 1596-1597, 1610-1612, 1764-1767, 2141-2148). Three witnesses testified in support of Gouveia's story that on the morning of the murders he was eating in the dining hall and thereafter went to the gymnasium (*id.* at 1549-1550, 1680-1681, 2114-2119, 2370-2378). Two witnesses testified that they were watching a football game with Reynoso at the time of the murders (*id.* at 1418-1420, 1442, 1520-1525).⁴⁸ Another witness verified Ramirez' testimony that he was lifting weights at the gymnasium at the time of the murder (*id.* at 1939, 2245-2247).⁴⁹

The trial of Mills and Pierce likewise refuted their pretrial contention that they would be unable to present witnesses who could verify their alibis and their claim that the murderer was disguised and therefore could not be identified. Six witnesses testified that at the time the murder was committed Mills and Pierce were eating a meal and that they were locked in the dining hall with other prisoners immediately after discovery of the murder (Mills Tr. 756-758, 777-779, 801-804, 819-824, 849-851, 1135-1137). Three other witnesses testified that they had observed the murder

⁴⁸ Reynoso alleges now simply that he "lost the opportunity to locate and call witnesses who could corroborate his two alibi witnesses" (Reynoso Br. in Opp. 6).

⁴⁹ In addition, the *Gouveia* respondents presented the testimony of the inmates who, according to the government's witnesses, fabricated the murder weapons and carried them into the prison. Both inmates denied any involvement in the crime (*e.g.*, Tr. 1795-1796, 2424). Other witnesses testified that government witness Steven Kinard had told them that he and another prisoner (who had since died), rather than respondents, had murdered Trejo because of a dispute over drugs (*id.* at 1855-1864, 1894-1897, 2064).

and that, contrary to testimony presented by a government witness, the assailants were masked at all times, so that their identities could not be determined (*id.* at 985-992, 1028-1030, 1048-1050).⁵⁰ Thus, none of the respondents was precluded from presenting a substantial defense because of an inability to locate witnesses.⁵¹ Indeed, respondents never claimed that they did not succeed eventually in locating all of the significant witnesses they had not found at the time of the pretrial motions.

Despite their pretrial predictions, Mills and Pierce in fact were able to present a substantial amount of expert testimony concerning physical evidence. A forensic pathologist who examined the scars on Mills'

⁵⁰ The *Mills* respondents also presented three inmates who testified that they were watching the entrance to the unit in which the murder of Hall occurred but did not observe respondents enter or leave (*Mills* Tr. 682, 708-709, 728-729). Inmates also testified that shortly after the murder the guard who had identified Mills at trial as one of the inmates who had fled from the unit in which Hall was murdered stated that he did not know the identities of Hall's assailants (*id.* at 684-685); that, prior to testifying that Mills admitted committing the murder, an inmate-witness stated that he would testify falsely in order to obtain leniency from prison authorities (*id.* at 971-973); that Hall had many enemies within the prison population as the result of his reputation as an informant and his involvement in drug dealings (*id.* at 734, 1086-1087, 1097, 1107-1109, 1451); and that bruises and cuts observed on the respondents' bodies shortly after the murders resulted from athletic injuries (*id.* at 1223-1225, 1325-1328).

⁵¹ The court of appeals rejected the government's contention that additional alibi testimony would have been cumulative on the ground, *inter alia*, that it was incorrect to assume "that the quantity of witnesses always can overcome the absence of any particular defense witness" (Pet. App. 23a). But neither the court nor the respondents pointed to any alleged missing witness whose testimony would have been qualitatively more valuable than that of the witnesses who testified.

arms and photographs of Mills' wounds and marks on Pierce's upper arm testified that, in his opinion, the injuries could not have been sustained during the murder of Hall (Mills Tr. 1278-1288). A forensic scientist testified (*id.* at 902-903) that hair fibers discovered on knit ski caps allegedly worn by the assailants during the murder did not correspond to hair samples taken from Mills and Pierce. A serologist testified (*id.* at 911-917) that, on the basis of his own tests and a review of FBI testing procedures, tests conducted by the FBI on a pair of blood-stained trousers worn by Mills on the day of the murder could not yield conclusive evidence of blood type.⁶² Finally, a neurologist testified (*id.* at 1312-1318) that Pierce was decidedly left-handed, providing support for the contention that it was unlikely that Pierce was Hall's assailant since the murder was committed by a right-handed person.

Respondents had the benefit of appointed counsel who conducted extensive investigations in preparation for trial and, as the dissenters noted (Pet. App. 28a), presented "defenses of uncommon quality and vigor." Thus, it is not surprising that the record demonstrates that respondents were able to produce every substantial amounts of evidence in support of their defenses (including 34 witnesses for the *Gouveia* respondents and 42 witnesses for Mills and Pierce). There is no indication in the court of appeals' opinion that it considered any of the record material discussed above. Indeed, had it done so, the court would have been hard-pressed to support its conclusion that prejudice must be presumed and that

⁶² In addition, the government's own expert witness testified that he had been unable to reach a definite conclusion about the type of the blood on trousers Mills and Pierce had been wearing on the evening of the murder (Mills Tr. 420-424).

substantial prejudice in fact "may have occurred" in this case (*id.* at 22a). The court of appeals' analysis of prejudice was clearly inadequate under either the standard courts use to measure prejudice in cases of bad faith preindictment delay or, a fortiori, under the high standard for right to counsel cases referred to by this Court in *United States v. Morrison*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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DECEMBER 1983

FEB 3 1984

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No. 83-128

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM GOUVEIA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

**BRIEF FOR RESPONDENT
WILLIAM GOUVEIA**

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QUESTIONS PRESENTED

- I. DOES THE SIXTH AMENDMENT ESTABLISH A BASIS FOR GRANTING AN INDIGENT PRISON INMATE THE RIGHT TO COUNSEL WHEN HE IS BEING HELD IN ADMINISTRATIVE DETENTION PENDING INVESTIGATION AND TRIAL FOR HAVING COMMITTED A FELONY?**
- II. DOES THE DEPRIVATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL FOR A PRISON INMATE NECESSARILY LEAD TO THE DISMISSAL OF THE INDICTMENT?**

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 704 F.2d 1116 (9th Cir. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1983. The petition for writ of certiorari was filed by the Government on July 25, 1983 and was granted on October 17, 1983. The jurisdiction of the court rests on 28 USC § 1254(1).

CONSTITUTIONAL PROVISION

The Sixth Amendment provides, in pertinent part: In all criminal prosecution, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT

A. William Gouveia was sentenced on April 23, 1981 to life imprisonment on Count II and to ninety-nine (99) years with a thirty-three (33) year minimum on Count I of a six count Indictment filed June 17, 1980 in the United States District Court for the Central District of California. His sentence followed two trials, the first of which began September 9, 1980. The first trial resulted in a mistrial due to the jury's inability to reach a unanimous verdict.

Mr. Gouveia was charged in two of the six counts. In Count I he was charged with conspiracy to murder Thomas Trejo and to convey from place to place within the institution knives to kill him. It was specifically alleged in the first count that Mr. Gouveia and Steven Kinard conspired to and did dispose of the knives used to murder

Thomas Trejo. In Count II he was charged with aiding and abetting others in the actual murder.

B. The Brief for the United States makes several factual misstatements concerning what transpired in the relevant history of the case as to Mr. Gouveia. The most significant error is in the allegation that Mr. Gouveia was removed from ADU and returned to the general prison population (Brief, p. 3). Mr. Gouveia's declaration in support of the motion to dismiss in the district court establishes that he did not return to the general prison population until March of 1979 and then it was a different institution. (J.A. 44). The Incident Report of December 13, 1978 confirms these facts where it states "Inmate Gouveia was placed in I-Unit on November 11, 1978 pending investigation by both the FBI and the Investigative Supervisor. Investigation completed this date (13 Dec 78) and now referred to the unit team for disposition." (J.A. 49). [See Argument in trial court at J.A. 89].

The Brief also states that following the murder the Federal Bureau of Investigation and prison officials began "independent" investigations. In their response to a Request for Administrative Remedy filed by Mr. Gouveia on December 29, 1978 the Bureau of Prisons, in the person of Regional Director Toft, states, "On 11/11/78 an incident report for codes 002, Assault code 202, possession of a Sharpened Instrument and code 801, Aiding and Abetting in the Commission of (A)ny of the (A)bove (O)ffenses was written on you for your suspected involvement in the death of another inmate at FCI, Lompoc. The incident was referred to the F.B.I. for investigation and possible criminal prosecution. After completion of F.B.I. interviews . . . you were given the incident report referencing the above charges on 12/13/78." (Copies of this document are part of U.S. Bureau of Prisons central

file for Mr. Gouveia). Similarly, the Brief implies that the United States Attorney's Office was not involved in the case until March of 1979 (p.4), while in fact they were advised of the fact that Mr. Gouveia was suspected as a murderer of Mr. Trejo on November 29, 1978. At that time they opened a file and an assistant was assigned for the investigation. (J.A. 50). The United States Attorney's Office began receiving written material on January 2, 1979. (J.A. 51).

C. On Saturday, November 11, 1978, Thomas "Hop-po" Trejo was killed as a result of forty-five (45) stab wounds. (R.T. 149).¹ The murder took place in Cell A-18 of M Unit at the Federal Correctional Institution at Lompoc, California. (R.T. 318-319).

Steven Kinard, an inmate of the Lompoc institution at the time of the murder, was the main witness at both trials. Kinard had originally been indicted along with the other defendants for the murder of Thomas Trejo. In September of 1980, after the indictment was handed down, Kinard offered to testify for the Government. As part of the subsequent plea bargain, the Government dropped the conspiracy and murder counts and allowed Kinard to plead to the lesser charge of conveying a weapon within the prison. (R.T. 569-580, 562-563).

Kinard testified to conversations among the defendants and other inmates in which they conspired to murder Thomas Trejo. (R.T. 488-533). He also testified to the arrangements that were made to obtain three knives and to his own assistance in the transportation of these knives both before and after the murder.

¹ "R.T." signifies the reporter's transcript of the retrial in the case of the Gouveia respondents.

According to Kinard's testimony, sometime after 11:00 a.m. on the day of the murder, the defendants and other inmates met in the gym corridor. The knives were retrieved from their hiding places and defendant Ramirez was sent to bring Trejo to M Unit where they planned to kill him. Kinard then went to his cell to wait. (R.T. 516-533). Approximately twenty (20) minutes later, defendant Gouveia called Kinard from his cell to help dispose of the knives, (R.T. 533-535). Kinard testified that he cleaned the knives and then gave them to Gouveia and Willard "B.T." Taylor, another inmate who also testified for the Government. (R.T. 536-558).

Willard "B.T." Taylor also testified to the disposal of the knives. His testimony differed from Kinard's in that Taylor alleged that Kinard, not Gouveia, asked him to get rid of the knives. (R.T. 874-875). Taylor testified to hiding the knives in the restroom of the second floor of E Unit. (R.T. 879).

Another inmate, Gene Newby, testified to seeing the defendants enter the cell of a friend, "Chavetes," around noon on November 11. Newby remembered seeing "Champ" Reynoso and "Black" Segura tear a bundle of clothes into strips and flush them down the toilet. (R.T. 1011-1017).

Other testimony established that a piece of writing paper was found at the scene of the murder and that defendant Gouveia's palmprint and a fingerprint were found on the paper. (R.T. 443-449).

Defendant Gouveia denied any involvement in the Trejo murder. (R.T. 2362-2363). He testified that on the morning of November 11, 1978, he worked out by himself at the weight pile in the yard until around 9:30 a.m. and then went to brunch. (R.T. 2370-2371). He then walked

around the track along with approximately fifty (50) other inmates. (R.T. 2372). Afterwards, he looked around the gym and returned to his unit for about an hour. He then went to the one o'clock movie for approximately twenty (20) minutes, went to the gym for a short time and then returned to his unit. (R.T. 2372-2372; 2375, 2378-2379). Respondent tried to produce several inmate witnesses to corroborate his testimony. (R.T. 1548-1549, 1844-1845, 1652, 1679, 1681, 2118-2121).

Inmate Tony Estrada also testified to seeing an exchange of knives between Michael "Flappers" Thompson and B.T. Taylor in K Unit shortly before 1:00 p.m. on November 11, 1978. (R.T. 1854-1860). This was the same time frame to which B.T. Taylor testified that the exchange of knives between Kinard and Taylor took place. (R.T. 874-875).

D. Respondent Gouveia arrived at the Federal Correctional Institute at Lompoc in October 1978. In the evening of November 11, 1978 he was locked down and placed in isolation pending the investigation of the murder of Thomas Trejo. (R.T. 2380). Mr. Gouveia never again returned to the general prisoner population at Lompoc. He remained in isolation throughout remainder of his stay at Lompoc and thereafter at other institutions until March 1979. (J.A. 44). During his isolation at Lompoc he was interviewed once by the F.B.I. on December 6, 1978. He was read his rights as if he were an accused in a criminal case, and then was interviewed concerning his knowledge of the Trejo murder. (J.A. 54, 54). Although he requested assistance of counsel at the administrative hearing, no counsel was provided preindictment.

During the preindictment period the Government, in the form of the F.B.I., interviewed over 100 inmates at

least once, several inmates more than once. [R.T. (first trial), Vol. B, 127]. The Government even took the time to interview some inmates away from the prison environment so that they might speak more freely. [R.T. (first trial), Vol. B, 128]. In addition, the information obtained from these interviews was memorialized in reports systematically made by the F.B.I. agents. (R.T. 2251-2522).

Prior to the first trial in this case, respondent Gouveia filed a motion to dismiss the indictment based on Sixth Amendment right to counsel and speedy trial arguments, and Fifth Amendment denial of due process. (Clerk's Transcript, p. 67). This motion was renewed prior to the second trial. (Clerk's Transcript, p. 118). In both instances, the motion was denied.

At trial the prejudicial effects of defendant Gouveia's inability to interview witnesses and memorialize their testimony during the lengthy preindictment delay became apparent with each witness' testimony. The transcript is replete with examples of witnesses who were forced to rely on habit evidence in order to answer counsel's questions as opposed to being able to remember the specific events of November 11, 1978. [Some examples: R.T. 1654:2-25; 1655:2-17, 1729, 1733, 1737:16-23, 1864-1866, 1969, 2127:11-17, 2136-2244]. Other witnesses simply could not remember specific facts of any kind. [Some examples from the First Trial: testimony of Tony Estrada, J.A. 114; Raymond Olvera, J.A. 98; William Gouveia, J.A. 108; Stephen Broughton, J.A. 102, Paul L. Allen, J.A. 106, Antonio Palacios, J.A. 93. From the Second Trial: R.T. 2122, 1654:2-25, 1655:2-17, 2379:6-15].

The erosive effect of the extensive delay was exacerbated by the fact that the murder took place within a relatively short period of time, approximately twenty

minutes. (R.T. 533-534). Even evidence of the conspiracy consisted of conversations that took place intermittently during the morning hours of November 11th, and a few sporadic conversations that took place prior to that date. The faded memories of witnesses contacted by the defense counsel over two years after the happening of the event were only of limited assistance in accounting for the whereabouts of respondent Gouveia at specific periods of time.

In addition to the prejudicial effects of the loss of memory of witnesses, the defense also lost two important witnesses entirely. By the time defendant Gouveia and his codefendants were indicted in June of 1980, and defense counsel was finally appointed, Richard Recendez, one of the alleged participants in the murder conspiracy according to the testimony of government witness Kinard, had died. (R.T. 739). Also, Michael "Flappers" Thompson had died before the indictment was handed down. Mr. Thompson was an important character in the defense version of the Trejo murder. (R.T. 2228). The defense tried to show that Kinard and Thompson had actually committed the murder with help from B.T. Taylor and then told other inmates that a group of Mexicans had been charged with the murder they committed.

The defense faced a wide variety of other problems due to the lengthy preindictment delay. For instance, the murder took place in a cell in M Unit. The front door of this cell consisted of bars which could be seen through by any of the inhabitants of M Unit. (R.T. 2339). It is conceivable that somebody in M Unit may have seen or heard something related to the actual murder. Yet when defense counsel tried to locate those people who were prisoners in M Unit on November 11, 1978, they discovered that 62 of the 67 prisoners who were there on that date

were no longer in Lompoc in 1980. (J.A. 90). While the Government had had almost two years to track down these prisoners and may in fact have interviewed them within a few days of the murder, defense counsel had only a matter of a few weeks to track down these prisoners and cut through the Bureau of Prisons' red tape. (J.A. 90). There was no substitute for the defense being able to interview these prisoners themselves. A defense attorney would have a different viewpoint than a prison official or F.B.I. investigator. He might have uncovered evidence that could assist in the presentation of the defense. Yet this source of witnesses had for all practical purposes disappeared by the time defense counsel were appointed.

SUMMARY OF ARGUMENT

The issue as framed by the court of appeals was "whether the isolation of appellants (respondents herein) in administrative detention pending investigation and trial obligated prison officials to provide counsel at any time prior to appellants' indictment." In rendering its opinion that court noted that for prison crimes the governmental interests that dictate the isolation of suspects do not lead to an arrest, nor prompt the early initiation of formal judicial proceedings, but rather cause the isolation of suspected inmates in administrative detention for what can be an indeterminate period. Furthermore, the position of an inmate being held in administrative segregation pending investigation of his crimes is more akin to that of a suspect outside prison who has been arrested than that of a suspect outside prison who has not yet been arrested. In the case of the former, the arrest forces the initiation of formal judicial proceedings or the release of the detainee, while there are no comparable rules in the prison setting. Therefore, in some circumstances the act of administrative detention will constitute sufficient "accusation" to give rise to the right to appointed counsel. The

appeals court then went on to establish rules and guidelines under which an inmate can establish that he is being held in segregation for investigation of a felony. Once the inmate has established these points at a prima facie level, it is up to the Government to refute them, provide counsel or cease the segregation.

1. Respondent Gouveia was placed in administrative segregation on November 11, 1978 because he was suspected of being involved in the death of another inmate in the Lompoc institution. The matter was referred to the F.B.I. for investigation. Their report was referred to the institution on December 13, 1978. On the same date the Government first provided Mr. Gouveia with copies of the Incident Report thereby advising him of the charges. (J.A. 48). Respondent then appeared before the Unit Discipline Committee which in turn referred the matter to the Institution Discipline Committee. On December 21, 1978 respondent Gouveia appeared before the I.D.C., was found "guilty" of assault (code 002), and aiding and abetting in the commission of the offense (code 801). He was disciplined by the loss of good time. He remained in segregation until he was released to the general prison population in Leavenworth, Kansas in March of 1979.

The court of appeals held that in the case of an indigent prison inmate who is placed in administrative segregation pending investigation of a crime, that there was a limit as to how long that inmate could be held for that purpose without providing him counsel pursuant to his request. Their decision properly recognized that under the system as it existed in 1978 the Government, both in the form of the prosecutors, their investigative agents and the Bureau of Prisons, had the unabridged ability to prevent a suspected felon from taking steps to secure the means of his defense by locating and preserving witnesses. The

requirement to provide counsel, as fashioned by the court of appeals, struck a balance between the needs of the Bureau of Prisons to be able to protect inmates and control the prison population, while providing the inmate suspect with real means to effect the constitutionally guaranteed right to defend himself.

2. The arguments asserted by the Government in its brief in seeking a reversal of the Ninth Circuit opinion resolve themselves into two basic points on the subject of an appropriate remedy. The first concerns what standard is to be applied in determining an appropriate remedy, where there is a finding of a denial of a Sixth Amendment right to counsel, for a prison inmate who has been placed in administrative segregation pending investigation for criminal charges. The second argument is that the record in this case does not establish "demonstrable prejudice or substantial threat thereof," which is the standard they suggest should be applied based upon *United States v. Morrison*, 449 U.S. 361 (1981).

The court of appeals took the position that in a case, where their standards for the right to counsel are met, the Government conduct has rendered counsel's assistance to respondents ineffective and the resulting harm is not capable of after the fact remedy. (Pet. App. 21a). Going further, the court considered that for inmates, such as respondent, it will ordinarily be impossible to adequately prove or disprove the existence of prejudice. In addition, the record disclosed that "substantial prejudice" may have occurred. (Pet. App. 22a).

In the case of respondent Gouveia, the record discloses that the Government's case against him consisted of testimony which sought to place him in the presence of the co-defendants during conversations which were to constitute the conspiracy and he was directly involved in the

disposal of knives after the murder. In order to refute this type of case it would be necessary to produce witnesses to establish that he was at locations other than as contended by the Government during the time those conversations took place. Where counsel is provided some twenty (20) months after the event, it would require going back to the records in order to try and establish who should have been there. Thereafter, those people would have to be located and interviewed. It would also necessitate that those people, once located, would have had some reason to remember who they did, or for that matter did not, see at a particular time and place in circumstances which at the time would have had no particular significance to them. In the setting of a prison system, it is doubtful that anyone would seriously suggest that this type of defense could be accomplished given the length of the delay. The trial transcript demonstrates that to the extent that defense counsel was able to find any witnesses at all, they were weak even in their ability to recall their own actions on the day in question, let alone those of someone else. Furthermore, in some cases, obviously critical information was just unavailable, as were certain witnesses. Therefore, it becomes unrealistic to expect that either party can prove or refute the existence of actual prejudice and fairness requires that the Government bear the burden of its conduct and the only available remedy is dismissal of the Indictment.

ARGUMENT

I

**DOES THE SIXTH AMENDMENT ESTABLISH A BASIS
FOR GRANTING AN INDIGENT PRISON INMATE THE
RIGHT TO COUNSEL WHEN HE IS BEING HELD IN
ADMINISTRATIVE DETENTION PENDING
INVESTIGATION AND TRIAL FOR HAVING COMMITTED
A FELONY?**

**A. The Granting Of Counsel To A Prison Inmate In These
Circumstances Is Required Under The Sixth Amendment
As Necessary To Preserve Equality In Our Adversary
System.**

The position of the Government in its brief before this court and that of the court of appeals as stated in its opinion are very similar in their recognition that administrative detention by prison officials is a legitimate activity, which is necessary for the safe and proper administration of the Federal Prison System.² Similarly, there is no issue as to the fact that as a "substantial deprivation of liberty" there are certain limitations upon its use and application. *Wolff v. McDonnell*, 418 U.S. 539 (1974) (Doughlas, J. dissenting); *Hewitt v. Helms* 103 S.Ct. 864 (1983). Therefore, Government arguments notwithstanding, the issue in this case is not whether such detentions are appropriate or authorized or even whether they constitute an "adversary judicial proceeding." Rather, it is a question of how to even up the respective adversary positions between the suspect and the prosecuting Government, when administrative segregation is being used to isolate an inmate "pending investigation or trial for criminal act." 28 C.F.R. 541.20(a)(3) (1982).

² Appellants in the court of appeals (respondents herein) did not challenge the legitimacy of administrative detention in general, nor do they do so before this court.

In the case of respondent Gouveia, he was isolated from the prison population at approximately 8:00 p.m. on November 11, 1978. He received a memo stating that this action was done pending investigation or trial for crimes committed in the institution. It was not until December 13, 1978, that a formal Incident Report was delivered to him. At that time he was advised of the charges against him.³ Thereafter, the Government refused his requests for the assistance of counsel on the grounds that he did not have a right to one. [*Wolff v. McDonnell*, *supra*, 418 U.S. at 570]. After adjudging respondent "guilty" at a proceeding in which he was not apprised of the identity of his accusers due to the "confidential" nature of the information, the Government continued to hold him in segregation, and in the process moved him from one institution to another. He eventually surfaced in the federal prison population in Leavenworth, Kansas in March 1979. (J.A. 44-47). During the period of his administrative segregation, respondent had no legitimate access⁴ to the general prison population at Lompoc, his access to the outside world was curtailed, (during the period of time he was in transit it was eliminated), and his life was placed in jeopardy as a potential government informer. (J.A. 45-46).

³ Gouveia was interviewed by the F.B.I. on December 6, 1978 at which time he was advised of his *Miranda* rights, in the same manner as if he was undergoing a "custodial interrogation." (J.A. 53). This was apparently the first time that he had any opportunity to do anything about his detention. (J.A. 45).

⁴ The Government suggests in its Brief that an inmate in segregation can conduct his own investigation through the "grapevine," windows, vents or while exercising his limited visitation with family. (Brief, p. 39). Assuming that such a suggestion has any practical sense, it seems uncanny that the Government is now suggesting that the prison regulations and procedures governing limited access to inmates in segregation should be circumvented by a suspect to try and preserve a defense.

In contrast, the Government had more than three trained investigators in the form of F.B.I. agents undertaking to interview over 100 inmates beginning November 11, 1978. The United States Attorney's Office had a file open and an assistant assigned to the investigation by November 29, 1978.⁵ (J.A. 50). The initial F.B.I. investigative report accusing respondent was returned to the institution on December 13, 1978. However, respondent had no ability to begin his own investigation, even in the form of memorializing the testimony of favorable witnesses, until he was released from segregation and of course at that time he was at a different institution.⁶ It was not until some 20 months after his initial lock down that he had counsel.

Speaking for the majority of this court, Mr. Justice Blackmun had the occasion to discuss the application of the Sixth Amendment right to counsel in the context of witness interviews in the case of *United States v. Ash*, 413 U.S. 300. Therein he indicated that this court would be unwilling to extend the right to counsel to a portion of the prosecutor's trial-preparation interviews with wit-

⁵The assistant assigned, Bert H. Deixler, handled the case through to and including the first trial.

⁶There is nothing in the record to suggest that the Government made any attempt to interview the witnesses whose names they received from respondent in his F.B.I. interview. The assertion by the Government that a prisoner can use such a procedure to identify and memorialize witnesses and evidence, assumes that the suspect is given information in sufficient detail about the factual basis for the charges to enable him to specifically designate what should be done on his behalf. In this case, that information was withheld in the interests of confidentiality. Respondent was therefore limited to trying to recall, almost a month after lock down, who he saw and what he did over the period of an entire day. His difficulty in this regard was increased by the fact that he was a recent arrival at the institution.

nesses. He recognized that in England in the 16th and 17th centuries counsel regularly interviewed witnesses before trial and that "The traditional counterbalance in the American adversary system for these interviews arises from the *equal ability* of defense counsel to seek and interview witnesses himself." (At p. 318) [Emphasis added]. This "equal ability," or in the case of the prison inmate in segregation, the lack of it, is the cornerstone of the court of appeals' opinion. The application of the Sixth Amendment right in this circumstance is directly to minimize the imbalance in the adversary system that results in these cases when the Government is free to pursue its investigation and the development of a case against a suspect who is prevented by the same government from doing so on his own behalf. [See also *Johnson v. Zerbst*, 304 U.S. 458 (1938)].

In a portion of its brief the Government has argued that a court that evaluates prejudice from the lack of appointed counsel during administrative detention should consider several factors, including the opportunities for the preservation of evidence afforded by the prison disciplinary proceedings, the amount of time that a defendant spends in the general prison population after the offense occurs, and the information the defendant's counsel receives in the form of inmate rosters and other inmate identification information. Respondent contends that consideration of these factors in his case demonstrates the need for counsel in order to "even up" the opportunity to defend himself at the time of trial.

In respondent's circumstances, he was locked down on the evening of November 11th and remained in that status until removed from the institution. (J.A. 44-47). He did not have the opportunity to preserve evidence or memorialize testimony at the disciplinary proceedings because they did not take place until more than 30 days

after his lock down and then he was not provided with the specifics of the accusations because they were "confidential." (J.A. 45). In the meantime the Government had three F.B.I. agents interviewing more than 100 witnesses at least once and in some cases more than once. (J.A. 50). Once respondent was removed from the institution he remained in isolation until March of 1979, when he was relaxed to the general population in Leavenworth. (J.A. 46). In his absence, the Government was able to continue its investigative process uninhibited. Respondent was unable to being preparation of his defense post indictment when counsel was appointed.

Counsel for respondent was provided with a list of inmates for various units in the facility, but the process of turning that into usable information was cumbersome and inaccurate. In order to find the present location of inmates it was necessary to send written requests to the Bureau of Prisons locator who in turn responded in writing. Thereafter, it was necessary to telephone various institutions or parole offices in order to establish a final location for various individuals. In the course of following this process it became apparent that the information on the lists provided by the Government was inaccurate. Rickey Resendez, who was identified by respondent in his F.B.I. interview, was not locatable using this method. (It turned out that Mr. Resendez died prior to the time of the indictment.) A "Macias" appeared on the M Unit housing lists (J.A. 70-75), but not on the M roster (J.A. 76-77). Mr. Trejo's name did not appear anywhere and the prison locator had respondent Gouveia as being released from Leavenworth, Kansas on September 24, 1979. (J.A. 63-69). Under these circumstances it is hard to conclude that counsel for respondent, once he was appointed, was in any way in a comparable position to government coun-

sel, Mr. Deixler, once he was assigned to the investigation on November 29, 1978.

At least for these respondents, it appears that the traditional counterbalance in the American adversary system which comes from an accused having counsel who has an equal ability to seek and interview witnesses was missing. Absent such an ability in prison inmate cases, then it is hard to support the position that the subsequent appointment of counsel after indictment will result in effective representation and a fair trial.

B. The Providing Of Counsel Under The Circumstances Set Out By The Court Of Appeals Is Reasonable In Relation To The Needs Of The Bureau Of Prisons And The Inmate Suspect.

A portion of the Government's argument before this court is based upon an analysis of the Sixth Amendment in the context of a specific event, i.e., the initiation of adversary judicial proceedings through formal charge. (Brief, p. 21). Clearly, even the Government recognizes that it is the circumstances which bring the right to bear, not the formalism of an event. These circumstances have been called a "critical stage" in such cases as *United States v. Ash*, *supra*, 413 U.S. 300; *Coleman v. Alabama*, 399 U.S. 1 (1970) (plurality opinion); *United States v. Wade*, 388 U.S. 218 (1967).

The court of appeals established in this case a fairly rigid set of circumstances as evidencing that a "critical stage" had been reached in the case of a prison inmate. First, the inmate must be held for more than the ninety (90) day isolation period permitted under the Bureau of Prisons' regulations. Second, the inmate must ask for an attorney. Third, the inmate must establish indigency. Fourth, the inmate must make a *prima facie* showing that one of the reasons for his continued detention is the

investigation of a felony. Furthermore, even if these facts are established, there is no automatic right to counsel. Rather, the Government has several choices, only one of which is to provide counsel. Significantly, if the Government can establish that the detention is not for the investigation of a felony, then there is no need for it to do anything. Similarly, if the inmate is being held in connection with the investigation of a felony, he can be released back to the general prison population. It is only when the Government seeks to keep a suspect in isolation while it continues its investigation that it must provide counsel to the indigent inmate who requests it.

The remedy fashioned by the appellate court directly and rationally meets the needs of both the Government and the suspect. In the case of respondent Gouveia, the appointment of counsel would have enabled him to have witnesses located and evidence memorialized against possible loss, without disrupting the Government's decision to move him physically to another institution. At this juncture the burden upon the Government would have been slight. Presumably, their investigation would be substantially completed, their witnesses located, statements taken and the physical evidence analyzed. A suspect's investigation through counsel would minimize the risk of coercion or harm to inmate witnesses.⁷

It would also be expected that an investigation by counsel would be guided by a knowledge of the legal

⁷ The Government has suggested in its Brief that one reason not to appoint counsel is because of the risk of coercion and retribution. (Brief, p. 28). This argument assumes that the kind of general investigation to locate witnesses and memorialize testimony, which respondent was prevented from doing in this case, would somehow generate these evils which the Government seeks to prevent. Furth-

issues and evidentiary requirements attendant upon a criminal trial. An inmate who attempts to conduct his own investigation from within the confines of segregation does not have access to the prison library or other sources from which he can gain an understanding of the legal ramifications of the steps involved in locating and preserving evidence, including statements. Under the alternatives set out by the appellate court, the inmate returned to the general population could acquire that technical knowledge from sources within the institution, or, if not returned, the appointed counsel would be provided the requisite knowledge. While it is true that one might say it would be to the inmate's advantage to remain in segregation and have counsel appointed, factually, the inmate's situation under the court of appeals decision would be analogous to that of an indigent suspect who had not yet been arrested. Until the time of his arrest, a suspect is left to his own resources, but without Government restriction. Once the arrest occurs (i.e., when the Government begins to restrict his movement) he must be brought before a magistrate and at that time counsel is appointed to provide the necessary legal expertise.

The significance of the presence of counsel to preserve evidence and witnesses for submission during trial should not be minimized in cases such as these involving prison inmates. One of the witnesses respondent brought forth at the first trial was barely able to testify because of the objections of Government counsel Deixler based upon the

ermore, it ignores the fact that a trial is supposed to be a search for the truth and that it is not uncommon for Government inmate witnesses to commit perjury in exchange for favors, such as a reduced sentence. Finally, it is noteworthy that in respondent's case there was no effort by the Government to justify the twenty (20) month delay on any basis related to the protection of witnesses.

witness' inability, almost two years later, to recall exactly when certain information came to his attention. The witness Tony Estrada was called because of conversations he had with "Flappers" concerning disposal of some knives. In upholding the Government's objections, the trial judge said: "... but I think that Mr. Deixler has put his finger on it; that we don't know when he received the information. If you can establish that the information he received was on the day of the murder, then I think you have laid your foundation, but at the present time, I don't believe you have laid that foundation." (J.A. 115). If counsel had been able to interview this witness closer to the time of the events in question, then a memorandum of that interview could have been used to refresh the witness' memory of dates and times, information which counsel would know was necessary to lay the foundation for the testimony. Significantly, during the course of the trial the Government was able to use that same evidentiary tool for its witnesses and to impeach defense witnesses. (J.A. 100).

II

DOES THE DEPRIVATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL FOR A PRISON INMATE NECESSARILY LEAD TO THE DISMISSAL OF THE INDICTMENT?

A. Dismissal Of The Indictment Is The Only Remedy Available To Neutralize The Prejudice Suffered By Respondents.

This court has indicated that the correct approach to fashion a remedy for Sixth Amendment deprivations is to identify the taint and devise a remedy to neutralize the prejudice so suffered so that the defendant is assured of a fair trial. *U.S. v. Morrison, supra*, at p. 365. In this case, by definition, the respondents were being held in admin-

istrative segregation in excess of ninety (90) days for the purpose of investigation of a felony. They were indigent and although they requested the assistance of counsel, counsel was denied them. The taint recognized by the court of appeals was that without the assistance of counsel their ability to defend themselves at trial was handicapped. (Pet. App. 20a). Under these circumstances, what remedy could neutralize a twenty (20) month delay?

The pretrial discovery disclosed that in the cell where the murder took place there was a brown paper bag containing the name "Sanchez." The bag also had two palm prints which were analyzed by the F.B.I., but could not be correlated to the respondents nor the then inhabitant of the cell, Mr. Macias. (R.T. 461-465). Part of the Government's case against respondent Gouveia included the introduction of finger print and palm print evidence which was located on a piece of paper found in the cell. The trial testimony established that the prints were placed on the paper prior to the murder, but the inmate to whom the cell was assigned denied any knowledge of it. (R.T. 830). There was also evidence of numerous other prints on a Playboy magazine located in the cell, which did not correlate to any of the respondents. (Macias denied any knowledge of the magazine, as well.) (R.T. 836) It was obviously to respondents' advantage to show that prints on movable items in the cell, such as the bag, the paper, and the magazine, did not necessarily indicate involvement in the murder, or placement at the time of the murder.* Presumably this could be accomplished by

* In respondent Gouveia's case, he was able to establish the placement of the prints as a pre-murder because the paper contained blood drops which were on top of the prints and were undisturbed. If the prints had been placed on the paper during or after the murder, the prints would have made an impression in the blood (R.T. 465-466).

locating and interviewing other inmates, such as "Sanchez," and inquiring as to the explanation for the presence of the brown paper bag in the cell where the body was found. However, this inquiry is easier said than done. In the case of the M Unit inmates there were only five (5) remaining out of the 67 names on the roster provided to defense counsel in September of 1980. (J.A. 90).

The Government, in its brief, has failed to suggest what remedy could neutralize the loss of so many potential witnesses on such a critical issue. Instead, it couches its position in the argument that it is the burden of the respondent to show that he has suffered substantial prejudice. Unfortunately, the Government does not suggest how respondent, while in segregation and while in transit from one location to another, could possibly have acquired sufficient information to make a showing as to what any of these 62 inmates might have said about the activities in and about M Unit on the date of Mr. Trejo's death. Similarly, it is possible that one or more of these individuals might have seen Michael Thompson ("Flappers") in the unit on the day of the murder.⁹

This is precisely the point recognized by the court of appeals. The presumption of prejudice is appropriately applied in these cases because it is impossible to prove or disprove prejudice because of the delay imposed by the Government and the failure to honor the request for counsel. The delay in seeking the indictment coupled with

⁹There is nothing in the record to suggest that the Government sought to inquire of the inmates in M Unit about the presence of Flappers and respondent could not. The information was not developed until counsel began to contact other inmates in respondent's unit in order to see if they remembered his being there on the day in question.) (R.T. 1878).

maintaining the respondents in segregation were acts totally within the control of the Government and cannot be attributed to the acts of the respondents.¹⁰

B. There Is Sufficient Evidence Of The Potential For Substantial Prejudice In The Record To Support The Dismissal Of The Indictment.

The Government questions whether the appellate court should have conducted an in depth review of the trial record in order to determine the presence or absence of evidence of demonstrative actual prejudice (Brief, p. 47) and they further assert that the trial evidence shows that in fact there was none. (Brief, p. 56). In support of the latter position they rely upon the number of witnesses produced, but ignore the quality of their testimony and the extent to which the Government prosecutor was able to impeach them on their lack of memory. Several of the witnesses produced by respondent testified in both trials and in many cases the transcripts of the first trial provide vivid evidence of the nature and extent of their failure of recollection. The Joint Appendix contains excerpts from some of the first trial testimony by Antonio Palacios,

¹⁰ The Government has suggested that one way in which a suspect in segregation can preserve evidence in his favor is to "provide full information about his activities to F.B.I. investigators." (Brief, p. 36). In the case of respondent Gouveia, he did provide information about his activities to the F.B.I. One of the persons named was Steven Broughton. During the first trial Mr. Broughton was called as a witness. He was extensively cross-examined by the Government on his failure to precisely recall details of the events of November 11th. At one point he was asked, "Did you have any reason to believe or suspect that your account of these activities might be questioned two years down the road? His answer was, "No, I didn't." It appears that the Government did not seek to confirm or deny the information given by respondent about this witness. (J.A. 105).

Raymond Olvera, Stephen Broughton and Paul Leroy Allen.

It is particularly telling to consider the testimony of two of these witnesses. On cross-examination, Mr. Broughton was asked about the first time he saw respondent Reynoso on November 11th. He responded as follows: "Between 10:00 and 11:00. You keep asking me certain times, and how can I remember certain times over two years ago?" Mr. Deixler replied, "I can't imagine," and the witness responded, "I can't either." (J.A. 104). During his testimony Mr. Allen testified to seeing respondent Gouveia in K Unit and having a conversation with him, but the best he could do for a time frame was between the hours of 11:00 a.m. and 1:00 p.m. While the Government has characterized this witness and others as "alibi" witnesses, it is apparent that they were not very helpful because they could not recall with specificity either events or times. While it is true that the Government can argue that had these witnesses been interviewed at or near the time of the events they would have had clearer memories which might have eliminated them entirely as potential defense witnesses, it is also true that they may have been better witnesses and led the defense to more corroboration for their testimony. In either case, such arguments are based upon speculation born out of a lack of knowledge and this is exactly the point of the appellate court's conclusion that in these circumstances neither side can ordinarily prove or refute the existence of prejudice and therefore the court must decide in whose favor to "tip the scales." (Pet. App. p. 22a).

It is clear that the potential for substantial prejudice exists in these cases and that its existence is directly attributable to the conduct of the Government; therefore,

it seems only fair that the Government be the one who must establish an appropriate remedy to remove the taint, and they have not done so. Accordingly, dismissal of the indictment is the only remaining remedy.

CONCLUSION

Based upon the foregoing, respondent urges the court to affirm the decision of the court of appeals, thereby reversing the convictions and ordering the indictment dismissed.

Respectfully submitted,

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No. 83-128

Office - Supreme Court, U.S.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

WILLIAM GOUVEIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF RESPONDENTS ROBERT E. MILLS
AND RICHARD RAYMOND PIERCE**

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QUESTIONS PRESENTED

1. May the Government, consistent with the Sixth Amendment guarantee of the right to counsel, commit a prison inmate to virtual solitary confinement and, in the absence of any demonstrable threat to the security of the institution, hold him there indefinitely without a lawyer while it builds a criminal case against him?

2. Did the denial of respondents' right to counsel during their prolonged isolation in administrative detention demonstrably jeopardize their ability to mount a defense, justifying the court of appeals' dismissal of the charges against them?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-128

UNITED STATES OF AMERICA,
Petitioner,

vs.

WILLIAM GOUVEIA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF RESPONDENTS ROBERT E. MILLS
AND RICHARD RAYMOND PIERCE**

STATEMENT OF THE CASE

This case raises the question of whether a federal inmate suspected of committing a prison crime, who poses no continuing threat to the security of the institution but is detained and isolated in administrative segregation pending indictment, is constitutionally entitled to the assistance of counsel prior to the completion of the Government's trial preparation and the return of formal charges. As did the district court, the en banc court of appeals answered this question in the affirmative.

1. Respondents' Eight-Month Isolation After the Lompoc Murder and the District Court's Dismissal Of Their Indictments. Thomas Hall was murdered at the Lompoc Correctional Institution on August 22, 1979. Within hours of the crime, respondents were forceably removed from their unit and isolated from the rest of the prison population (Tr. 445-46).¹

¹ "Tr." signifies the transcript in this case; "Pet. App." signifies the Appendices to the Petition; "Pet. Brief" signifies the brief for the United States; "JA" signifies the Joint Appendix; "CR" signifies the district court clerk's record (which is accompanied by the appropriate docket entry number); and "Ex." signifies an exhibit in this case.

Taken to a prison office for interrogation, respondents were advised of their right to appointed counsel, but when they asked to consult with attorneys, their requests were summarily denied (JA 128). Following this initial investigation, the authorities concluded that respondents "were suspects in the homicide" (Tr. 446), and respondents were transferred to the prison's Administrative Detention Unit ("ADU"), from which they would not emerge until April 21, 1980, when they appeared for arraignment in Los Angeles to plead to a murder indictment that had been returned the previous month (Pet. App. 42a-44a).

The Government could offer no evidence to the district court that respondents were detained in ADU for security reasons. The detention orders prepared on the evening of the murder committed respondents to ADU because they were "pending investigation of a violation of institution regulations" and were "pending investigation or trial for a criminal act" (JA 138, 139). Pursuant to Bureau of Prisons regulations, the printed forms required an explanation of why respondents' continued presence in the general population would jeopardize the security of the institution (28 C.F.R. § 541.22(b)), but the prison's Correctional Supervisor made no reference to security concerns other than to note that respondents were "pending investigation" (JA 138, 139). Indeed, as the Government conceded below, the sole reason for respondents' continued detention after completion of the prison's investigation on September 13, 1979, was the ongoing criminal investigation and impending indictment (Pet. App. 42a-43a).²

Throughout their eight-month commitment in ADU, respondents were confined to three-by-five foot cells for all but thirty minutes of each day, with occasional respites in desig-

² The Government also failed to identify any security concerns underlying respondents' eight-month detention in the declarations it filed in opposition to respondents' dismissal motion (JA 140-46), its nineteen page memorandum in opposition to that motion (JA 156-66), or its argument to the district court (JA 170-80). Further, although it submitted substantial objections to the proposed findings of the district court, it took no exception to the determinations that respondents had been held in ADU pending "investigation or trial for a criminal act" (Pet. App. 43a), that respondents' detention "was neither a form of prison discipline nor an attempt to ensure prison security" (Pet. App. 47a) and that respondents "stood accused" of the Hall murder long prior to the return of an indictment (Pet. App. 48a). (See JA 167-169).

nated areas of the prison's visiting room. Locked in a prison within a prison, they remained virtually isolated from the entire inmate population. Without funds to hire one, they could not speak to an attorney. They could not contact inmate or staff witnesses. They could not discuss their case with anyone other than prison personnel and FBI investigators. Thus, although almost immediately informed by prison officials that they would eventually be indicated and tried for the Hall slaying, for eight critical months respondents were deprived of any opportunity to prepare to defend themselves against this charge of first degree murder (Pet. App. 44a).³

Pursuant to Bureau of Prisons regulations, disciplinary hearings were conducted in September of 1979. Based on evidence consisting only of undisclosed "confidential information," respondents were charged with the Hall murder (JA 136-37). Respondents denied the charges. They again requested and again were denied the assistance of counsel or, for that matter, the assistance of any neutral person to act on their behalf (JA 130). At the conclusion of those hearings, which ended 22 days after respondents' commitment to ADU, prison authorities stripped respondents of all of their accrued good time, and the prison's internal investigation and disciplinary proceedings were closed (JA 137).⁴

Nonetheless, with the knowledge of the FBI agents in charge of the criminal investigation, respondents remained in ADU — ostensibly pursuant to regulations which authorized open-ended detention of "pretrial inmates" (see 28 C.F.R. § 541.22(a)(3) & (6)(i)). In the meantime, the FBI and federal prosecutors pursued criminal proceedings at a leisurely pace even though, as the Government conceded below, had respondents been at-large on the evening of the murder, they would have promptly been arrested, taken before a magistrate

³ The severity of respondents' conditions of confinement, as well as the real-life consequences of their detention on their status with fellow prisoners, were described in a declaration submitted by respondent Mills, the accuracy of which was not challenged by the Government (JA 131-33).

⁴ Apparently, no hearings concerning respondents' continued detention were held. Sometime after the final disciplinary hearing, however, Mills was advised that he was being considered for an administrative transfer to the Federal Penitentiary in Marion, Illinois (JA 130). Prison officials took no action to implement the transfer, deeming it "inappropriate" because "of the view that there would be an indictment coming out of this district" (JA 176).

and provided with lawyers (JA 171; Pet. App. 46a). Respondents, of course, were securely confined and isolated in ADU, and the Government was thus under no pressure to tie up the loose ends of its investigation in a timely manner. Indeed, it did not present its case to a grand jury for another seven months — four months after it completed its forensic analyses, five months after it secured the cooperation of various inmate witnesses, and six months after it identified and debriefed the prison employees on whose testimony it expected to rely (JA 147-48; Pet. App. 46a).

Respondents were finally arraigned and provided lawyers on April 21, 1980. Because of the belated appointment of their counsel and respondents' inability to investigate on their own while in ADU, the district court took an unusually active role in supervising discovery in an attempt to assure respondents a fair trial (*see* JA 176). In the court's opinion, however, even the benefits of the most liberal discovery — which it noted the Government strenuously resisted (*id.*) — could not overcome the prejudice resulting from respondents' eight-month isolation without appointed representation. The district court dismissed the indictments, having concluded, as expressly stated in its findings, that respondents' lack of representation while in ADU had unalterably impaired their ability to mount a defense (Pet. App. 46a-47a, 49a).

2. Respondents' Trial. For the reasons summarized in the Solicitor General's brief, the district court's order of dismissal was overturned on appeal, and the case remanded for trial. The question of respondents' guilt or innocence was hardly clear-cut during that month-long proceeding. Even the Government's forensic evidence, mentioned only in passing by the Solicitor General, raised substantial doubt about respondents' involvement in the murder. For example, FBI and defense criminologists agreed that hair samples extracted from stocking masks admittedly worn by the assailants could not have come from either respondent (Tr. 392-93, 397-400). Perhaps most importantly, the prosecution's sole percipient witness and pathologist alike testified that the murder was committed by someone stabbing with his right hand (Tr. 93, 458), and yet the trial evidence unquestionably established that respondent

Pierce, who was alleged to have wielded the knife, was left-handed (Tr. 1113-16, 1120-23, 1129).

The prosecution's identification testimony was also riddled with inconsistency. The Government placed considerable reliance on Clifford Wilson, a prison guard who purportedly saw respondent Mills flee from the murder scene. Yet, the prosecution's principal inmate witness testified before the grand jury that he discovered Guard Wilson asleep at his desk moments after the murder (Tr. 128-29). The prosecution's sole eyewitness to the assault, inmate Gary Mellon, was contradicted by four other inmates, including one called by the prosecution (Tr. 154-55, 992, 1029-30, 1084-50). All four were present at the scene and each testified that the assailants' faces were masked during the murder. Further, Mellon testified for the prosecution only after striking a bargain which he virtually acknowledged at trial had earned him a release after serving only three years of a thirty-year sentence (Tr. 135).⁵

Although handicapped by their lack of representation during the eight months following the Hall murder, respondents were able to offer the testimony of a number of inmates who, with varying degrees of certainty, placed respondents in the prison dining hall at the time the institution was "locked-down" in the aftermath of the murder (e.g., Tr. 756-58, 777-79, 801-04, 819-24, 849-51, 1135-37). Three other inmates testified that they were seated adjacent to the only entrance to the murder-scene unit but could not recall either respondent entering or leaving the unit at the time of the murder (Tr. 682, 708-09, 728).

⁵ The remainder of the prosecution's case consisted of ambiguous physical evidence and wholly dubious inmate witness testimony. For example, inmate Kurt Ehle — a self-styled Jewish member of the Aryan Brotherhood — testified that Mills plotted the Hall murder in his presence. Yet, Ehle conceded that he had arrived at the institution just one week before, was introduced to Mills only after the murder and was literally a complete stranger to Mills at the time of the alleged conversation (Tr. 595). In the same vein, the prosecution relied on inmate Butch Wagner's recollection of incriminating conversations Mills allegedly had with another inmate when all three were in ADU following the Hall murder. Wagner admitted, however, that at the time he was in protective custody in ADU at his own request and therefore was "pretty much off limits" to all other detainees, who suspected he was a "snitch" (Tr. 355).

More compelling, however, was evidence concerning the victim. According to prison records, Tom Hall was an unsettled, young convict who was active in the prison's drug commerce. Hall had experienced recurrent problems getting along with his fellow prisoners (Tr. 165-67, 1097, 1108-09, 1451). In fact, months before his alleged dispute with Mills over a debt (and prior to respondent Pierce's arrival at Lompoc), Hall had been labeled a "snitch" (Tr. 1086, 1109) and unidentified inmates firebombed his cell. Soon thereafter, Hall requested that he be placed in ADU for his own protection (Tr. 1086-88, 1093, 1102-03). Writing to his parents from ADU in April 1979, four months before his death, Hall penned a farewell letter and asked that it be read "at my funeral" (Ex. 105B; Tr. 1104-05).

3. The Dismissal of the Indictments by the En Banc Court of Appeals. The issue as defined by the en banc court of appeals was "whether, under any circumstances, a federal prisoner suspected of committing a crime while in prison and placed in administrative detention is constitutionally entitled to an attorney prior to indictment" (Pet. App. 2a). The court began its analysis by observing that the right to counsel attaches when "an attorney is necessary to preserve the accused's right to a fair trial or to ensure that the accused will receive effective assistance of counsel at the trial itself" (*id.* at 6a). Under this standard, the court reasoned, open-ended detention of an inmate-suspect in ADU compels the appointment of counsel if the inmate is to be assured a fair trial. It noted that "an inmate suspected of crime must overcome investigatory obstacles even greater than those facing the prosecution," including the rapidly changing composition of the prison population and the reluctance of inmates to become involved (*id.* at 11a-12a). The court concluded that "early access to the general prison population is critical to the suspect's ability to prepare and preserve a defense" and that prolonged isolation without counsel invariably jeopardizes an inmate's right to a fair trial (*id.* at 12a).

The court of appeals next considered the more difficult issue of whether an inmate isolated in ADU is an "accused" for Sixth Amendment purposes and thus constitutionally

entitled to the assistance of counsel. In analyzing this issue, the court carefully defined the nature of ADU detention it was considering. It noted that respondents had been confined in ADU not as a method of discipline or "to defuse a potentially explosive confrontation and to protect inmates from harm" (Pet. App. 10a). Rather, the court correctly recognized that it was dealing with administrative detention of "an indeterminate period" imposed because of a "pending [criminal] investigation or trial for a criminal act" where no demonstrable security-related justifications existed apart from respondents' status as "suspects" (*id.* at 11a).

Noting that "whether a person stands accused can only be determined from the totality of circumstances" (Pet. App. 8a), the court observed that respondents' pretrial detention served the same objectives that typically prompt an arrest outside the prison walls. There was one crucial difference, however: "[u]pon arrest a defendant must be arraigned 'without unnecessary delay' . . . [at which] point the accused is guaranteed the assistance of counsel" (*id.* at 12a-13a), but within the prison walls no such procedural guarantees operate. The accused is already in the Government's custody, and unless the protection of the Sixth Amendment applies to detainees before the completion of the Government's trial preparation and the inmate's indictment, the prosecution can freely suspend the inmate's right to counsel indefinitely. The court rejected this result as inconsistent with the guarantee of counsel, and held that an inmate pretrial detainee, like an arrestee, is entitled to an attorney upon showing that his confinement in ADU is related to the impending criminal charges and not to any legitimate security concerns of the institution.⁶

Inasmuch as respondents had been isolated in ADU without attorneys for periods of up to twenty months solely because they were the subjects of criminal investigations, the court concluded that they had been denied their Sixth Amend-

⁶ Relying on Bureau of Prisons regulations which, except in extraordinary circumstances, limit investigatory and disciplinary segregation to 30 and 60 days, respectively (*see* 28 C.F.R. §§ 541.13 & 22(c)), the court confined the reach of its holding to inmates held in ADU for more than 90 days (Pet. App. 17a).

ment right to counsel; and it turned its attention to the appropriateness of dismissal as a remedy. After reviewing the record in the *Mills* case, the court agreed with the district court's conclusion that, because of their belated appointment, respondents' attorneys simply could not provide their clients with effective assistance of counsel (Pet. App. 21a). Although the court flatly rejected the Government's contention that respondents' showing of prejudice had been inadequate, it also suggested that in cases such as this prejudice may be presumed "because ordinarily it will be impossible adequately either to prove or refute its existence" (*id.* at 22a). The court found the presumption unnecessary in this case both because of "evidence that 'substantial prejudice' may have occurred" and because of the Government's failure to refute respondents' showing of the likelihood of prejudice (*id.* at 22a).

SUMMARY OF ARGUMENT

The Solicitor General seeks reversal of a rule that was not adopted below. The court of appeals did not construe the Sixth Amendment to require the "appointment of counsel for indigent inmates held in administrative detention for more than 90 days pending criminal investigation" (Pet. Brief 12, 15, 19, 33). Its decision was far more narrow. Recognizing that segregated detention plays an important role in the administration of a prison, it simply held that when an inmate subject to a criminal investigation is detained beyond ninety days in segregated custody pending indictment for no apparent security-related reason, he should be afforded an opportunity to establish that his detention is the result of a decision to hold him to answer impending criminal charges. An indigent inmate who carries this burden, the court reasoned, is as much "accused" as one arrested outside the prison walls, and he is constitutionally entitled to appointed counsel or, alternatively, to be released from segregated custody so that he may take steps to preserve his defense.

1. When used as a method of disciplining inmates, of providing a "cooling-down" period following a breach of prison order, or of ensuring the security of the institution or the safety of other inmates from demonstrable harm, administrative detention is without constitutional significance. On

the other hand, when as here administrative detention is imposed for no security reason but instead solely to hold an inmate to answer impending criminal charges, it becomes the functional equivalent of an arrest and pretrial detention. As such, the imposition of administrative detention is "accusatory," triggering constitutional safeguards equivalent to those that inure when a man outside the prison walls is forcibly removed to the station house and detained to answer criminal charges that the authorities are preparing to bring.

In viewing respondents' segregation as resulting from security concerns, the Solicitor General grievously misapprehends the records in this case. Respondents were detained in ADU not because they threatened the security or good order of the Lompoc Penitentiary. Nor were they held in virtual solitary confinement for periods of up to nineteen months because of any particularized or demonstrable concern for the safety or well-being of other inmates. Rather, as the district court expressly found, and as the court of appeals confirmed, respondents were continued in ADU following a thirty-day prison investigatory period solely because they were the targets of impending criminal indictments.

Thus, the pivotal issue is whether, consistent with the Sixth Amendment guarantee of counsel, the Government may commit an "accused" prison inmate to virtual solitary confinement and, in the absence of any demonstrable threat to the security of the institution, hold him there indefinitely without a lawyer while it builds a case against him. In arguing that it may, the Solicitor General urges acceptance of a principle foreign to our system of criminal justice: that in prison as elsewhere, an individual may be detained in isolation without counsel for as long as the Government takes to prepare its case, hand down an indictment or other formal charge, and thus commence formal, adversary proceedings. This Court has never subscribed to that view. Rather, it has held that the right to counsel attaches during those pretrial phases of a criminal proceeding whenever the absence of counsel would jeopardize the accused's fundamental right to a fair trial.

It cannot seriously be debated that the absence of counsel jeopardizes the fundamental right to a fair trial when an accused inmate is held incommunicado for months and years

without any realistic opportunity of preparing his own defense to a charge the Government alone has the ability to investigate. As borne out by the records in this case, in the unique setting of a correctional institution, protracted delay in the appointment of counsel constitutes a denial of effective representation altogether. Unlike the world outside, the prison population is exceedingly transitory, and inmates know one another not by legal names but by prison sobriquets. Unless promptly located and debriefed, an inmate released from custody or transferred to another institution is frequently irretrievably lost as a defense witness. The irremedial effects of delay in appointing counsel are compounded by an inmate code of ethics which, as a rule, encourages inmates to deny knowledge of relevant information and to fabricate stories to distance themselves from the events in question when interrogated by prosecution investigators. As a result, when for prolonged periods of time only the Government has the ability to investigate, exculpatory witnesses are disabled or neutralized by virtue of their prior inconsistent statements and the fear of potential criminal prosecution for perjury or the giving of a false statement. These and similar inequities have led the drafters of two model codes, including the American Bar Association, to reach the same conclusion as the court of appeals and to limit to ninety days the time an inmate-suspect may be confined in investigatory segregation without constitutional guarantees attaching.

2. This Court has held that when an accused has been denied access to counsel, dismissal of the charges against him is appropriate if the constitutional violation has resulted in "demonstrable prejudice, or [a] substantial threat thereof." *United States v. Morrison*, 449 U.S. 361, 365 (1981). On the basis of the record before them there was more than a substantial basis for the court of appeals and district court to conclude as they did that "the opportunity for [respondents'] counsel to prepare the defense that is constitutionally guaranteed all persons accused of crime did not exist" (Pet. App. 21a). In light of the protracted delay in the appointment of counsel during a period when the Government alone was able aggressively to build its case, both courts ruled that respondents "simply did not have the opportunity to make the kind of

investigation that the government made" (*id.* at 47a), an investigation which was necessary to ensure a fair trial. Potential defense witnesses could no longer recall the events with adequate clarity, or they had long since disappeared after being transferred or released from custody altogether. Physical evidence had either deteriorated or been misplaced. Respondents found themselves entirely foreclosed from effectively investigating the source of earlier threats on the life of Thomas Hall, or the identity of those responsible for a prior attempt on his life. Exculpatory witnesses, who, during the months and years that respondents remained incommunicado, had been forced to submit to FBI interviews and who often fabricated stories so as not to become involved, chose not to testify for fear of the consequences or were discredited at trial by their prior inconsistent statements.

In urging that these considerations were inadequate to satisfy the *Morrison* test of "substantial prejudice or [a] demonstrable threat thereof," the Solicitor General sub silentio asks this Court to overturn *Morrison* and to engraft onto the Sixth Amendment the "actual prejudice standard" applied to the evaluation of claims of undue preaccusation delay under the Fifth Amendment. Even were this Court to put aside the findings of the district court and court of appeals that the proof in this case established actual prejudice, the Fifth Amendment standard is singularly inappropriate for safeguarding the right to counsel under Sixth. Unlike the target of the delayed indictment, who is free to conduct his own investigation and thus capable of subsequently proving actual prejudice, respondents were disabled by the Government from initiating their own defense and denied their right to be assisted by counsel in that endeavor. More importantly, the "actual prejudice" test — which in modern federal jurisprudence few have been capable of satisfying — is far too inadequate a safeguard for the protection of the right to counsel, the cornerstone of our adversarial system of criminal justice.

ARGUMENT

I. IN THE ABSENCE OF LEGITIMATE SECURITY CONCERNS, AN INMATE TAKEN INTO AND DETAINED IN SEGREGATED CUSTODY PENDING INDICTMENT—NO LESS THAN A MAN ARRESTED AND DETAINED OUTSIDE THE PRISON WALLS—STANDS “ACCUSED” OF A CRIME AND IS THEREFORE CONSTITUTIONALLY ENTITLED TO THE ASSISTANCE OF COUNSEL

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” Because respondents were detained and isolated in ADU to answer impending criminal charges, by that detention the Government rendered them accused in the course of a criminal prosecution. By delaying the appointment of counsel for up to twenty months, the Government deprived them of a right due all accused persons, namely, to have the effective assistance of counsel for their defense.

A. For Purposes of the Sixth Amendment, Detention Imposed to Hold an Inmate to Answer Impending Criminal Charges Constitutes an “Accusation”

By its terms, the Sixth Amendment guarantees an “accused” in a “criminal prosecution” the assistance of counsel. Addressing the companion Sixth Amendment right to a speedy trial, this Court has repeatedly construed the term “accused” to encompass persons who have been deprived of their freedom in any significant degree because the Government suspects them of criminal conduct. Thus, in *United States v. Marion*, 404 U.S. 307 (1971), after noting that “the [Sixth] Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been ‘accused’ in the course of that prosecution” (*id.* at 313), the Court held that the Government renders one an “accused” by “either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge” (*id.* at 320). Although declining “to extend the reach of the amendment to the period *prior to arrest*,” the Court explained

that "accusation" within the meaning of the Sixth Amendment "need not await indictment, information, or other formal charge" (*id.* at 321) (emphasis added).⁷

Because there is no gainsaying that Sixth Amendment principles operate equally within the prison walls, *see Moore v. Arizona*, 414 U.S. 25, 27 (1973); *Strunk v. United States*, 412 U.S. 434, 437-38 (1973), *Smith v. Hooy*, 393 U.S. 374, 378 (1969), the courts below were manifestly justified in concluding that respondents' prolonged detention in segregated custody was tantamount to an "arrest" and, for purposes of the Sixth Amendment, an "accusation" in the course of "a criminal prosecution" (*see* Pet. App. 11a-12a, 47a-48a).⁸

⁷ The Solicitor General focuses on the language in *Marion* that speedy trial rights accrue upon "arrest and holding to answer a criminal charge," and apparently suggests that an arrest does not constitute an accusation until the return of some formal process to which the accused must respond (Pet. Brief 30). But as is evident from the discussion in *Marion*, the Court referred to "holding to answer a criminal charge" only to contrast pretrial detention with the situation in which a suspect is briefly detained but then unconditionally released. *See* 404 U.S. at 321 & n.12. Further, any ambiguity in *Marion* as to what constitutes an accusation was resolved by *Dillingham v. United States*, 423 U.S. 64 (1975), a case in which the court of appeals had discounted for speedy trial purposes the period between arrest and the return of charges. The Court reversed. Noting that one is not accused during the Government's investigatory stage, the Court wrote: "In contrast, the Government constituted petitioner an 'accused' when it arrested him and thereby commenced its prosecution of him" (*id.* at 65). *See also United States v. MacDonald*, 456 U.S. 1, 7 (1982) ("In addition to the period after indictment, the period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim.") In any event, *Marion* and *Dillingham* did no more than reaffirm what the Court had earlier held in *Miranda v. Arizona*, 384 U.S. 436, 477 (1966), namely, that an arrest marks the "point that our system of criminal proceedings commences."

⁸ The court of appeals properly viewed its decision as consistent with *Hewitt v. Helms*, 103 S. Ct. 864 (1983), which held that when a state delimits the circumstances under which administrative detention may be imposed, as has the Federal Government, an inmate is entitled to a hearing in connection with his confinement (*see* Pet. App. 17a-18a). But even in the absence of regulations limiting the use of ADU, *Hewitt* would not dictate a contrary result here. *Hewitt* considered principally the question whether confinement in administrative detention implicates "an interest independently protected by the Due Process Clause" 103 S. Ct. at 870. The issue here, unlike in *Hewitt*, is not the right to be free of administrative detention under the Fifth Amendment, but whether confinement under the specific facts of this case gives rise to a right to counsel under the Sixth. Thus, *Hewitt* does not alter the fact that apart from procedural due process considerations,

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Respondents were made to suffer significant restraints on their freedom over and above their normal conditions of confinement, conditions which would have allowed them to investigate the charges against them. Despite Bureau of Prison regulations which prescribe that administrative detention "be used only for short periods of time," 28 C.F.R. § 541.22(e), respondents were held for months and years in virtual solitary confinement, isolated even from fellow administrative detainees for nearly twenty-four hours a day.⁹ More importantly, respondents were held in ADU to answer impending criminal charges.

1. Respondents' Detention Was Not Imposed to Ensure the Security of the Institution, but Only to Hold Them to Answer Impending Criminal Charges. With the possible exception of the initial twenty-two days, respondents' confinement in administrative detention reflected solely a decision to hold them to answer impending criminal indictments. As noted before, respondents were placed in ADU pending the completion of the prison's disciplinary investigation and "pending investigation or trial for a criminal act" (JA 138, 139). Yet, the internal investigation and disciplinary proceedings terminated on September 13, 1979 (*id.* at 137), more than seven months before respondents were to emerge from ADU. Indeed, in the proceedings below the Government offered no

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prison authorities may not impose more restrictive conditions of confinement oblivious to the constitutional rights thereby implicated. See *Cervantes v. Walker*, 589 F.2d 424 (9th Cir. 1978); *State v. Overby*, 249 Ga. 341, 290 S.E.2d 464 (1982); and *People v. Smith*, 117 Misc.2d 737, 459 N.Y.S.2d 528 (Sup. Ct. 1983) (recognizing that segregation of an inmate implicates the right to be free of uncounselled interrogation by authorities that otherwise would be permissible were the inmate in the general prison population). Cf. *Montanye v. Haymes*, 427 U.S. 236, 242 (1976) (procedural due process does not attach to review an inmate's condition of confinement so long as it is "within the sentence imposed upon him and is not otherwise violative of the Constitution") (emphasis added).

⁹ The Solicitor General belittles the dramatic transformation in respondents' conditions of custody and status within the institution when he says that detainees are entitled to the same privileges as prisoners in the general population (Pet. Brief 15). But the regulations provide for comparable privileges only "[i]f consistent with available resources and the security needs of the unit" (28 C.F.R. § 541.20(d)). For a more realistic portrayal of ADU, see JA 131-33.

explanation for respondents' continued detention other than the impending criminal indictments, and ultimately, it conceded that respondents' isolation was attributable to the ongoing criminal investigation and nothing else.¹⁰

The Solicitor General thus seeks to recast the records in this case when he urges that respondents' prolonged detention resulted merely from the Warden's legitimate judgment that their confinement was necessary to maintain order in the institution and to protect other inmates from harm. It is undoubtedly true that in particular cases the segregation of an inmate pending investigation may be necessary to "maintain prison security and to assure the safety of prison staff and other inmates, including potential witnesses" (Pet. Brief 25). However, there is absolutely no evidence in the record to establish, as the Government now claims, that such concerns "underlay the placement of respondents in administrative detention" (*id.* at 16). Further, no credible claim can be made in this case that respondents' eight-month separation from the general prison population was necessary to protect potential inmate prosecution witnesses. With the exception of one inmate who demanded a transfer as a prerequisite for even speaking with the FBI, all of the inmates on whose testimony the Government expected to rely at trial had been identified and debriefed within the first fifty-seven days of respondents' detention (Pet. App. 46a; JA 148), and arrangements were made to transfer them to other institutions (JA 145).

¹⁰ See *supra*, at 2 & note 2. In no fewer than five places, the Solicitor General quotes or paraphrases the language of 28 C.F.R. § 541.22(a), purportedly requiring a finding before committing an inmate to ADU that the inmate's "continued presence in the general population poses a serious threat to" the prison population or the security of the institution. Repetition, however, does not serve to establish a security basis for respondents' detention, who were labelled security risks solely by preprinted language in a detention order and solely because they were "pending investigation" (JA 138, 139). Moreover, as noted before, there is simply no basis for the Solicitor General's claim that Mills was detained for the additional reason that he was about to be transferred to the Marion Facility (*see supra*, at 3 note 4). This explanation would also require an assumption that prison authorities violated their own regulations. With respect to inmates in ADU who are being considered for transfer, Bureau of Prisons regulations provide that prison authorities must within 90 days "return the inmate to the general inmate population or effect a transfer to a more suitable institution." 28 C.F.R. § 541.22(a)(6)(i).

The Solicitor General's purported security justification for respondents' prolonged isolation in ADU also ignores the district court's finding that respondents' "commitment to ADU was neither a form of prison discipline nor an attempt to ensure prison security" (Pet. App. 47a), a finding to which the Government until now offered no objection (*see* JA 167-69). The court of appeals similarly relied on the fact "that pretrial detention was the *only* reason for the Mills' defendants prolonged stay in ADU" (Pet. App. 19a). In fact, the en banc opinion was careful to avoid attaching Sixth Amendment significance to detentions imposed for legitimate security reasons:

"Importantly, appellants do not contend that temporary isolation carries with it a right to appointed counsel when the detention is imposed for security reasons. Nor could they. Prison officials are charged with maintaining order and ensuring the safety of inmates and prison employees. Serious crimes compound the difficulty of this responsibility in what is necessarily a volatile environment. Temporary isolation, imposed to defuse a potentially explosive confrontation and to protect inmates from harm, is part of the correctional process. It is unrelated to any subsequent criminal prosecution" (Pet. App. 10a-11a).¹¹

¹¹ That respondents were held in ADU in the absence of any legitimate security concerns distinguishes this case from the lower federal court decisions cited by the Solicitor General for the rule that detention of an inmate triggers no Sixth Amendment rights. For example, in *United States v. Duke*, 527 F.2d 386 (5th Cir.), *cert. denied*, 426 U.S. 952 (1976), the issue was whether imposition of 35 days of segregated confinement gave rise to the Sixth Amendment right to a speedy trial when the detention was used "as a method of disciplining or investigating inmates who break prison regulations, of protecting certain inmates from members of the general population, and of providing a general cooling-down period for inmates involved in events that could disrupt the general population" (*id.* at 390). Although the Fifth Circuit identified no speedy trial right in *Duke*, it made clear its view that administrative detention is immune from Sixth Amendment consequences only to the extent that it is "in no way related to or dependent on prosecution by the federal government of an inmate for that same offense as a violation of federal criminal law" (*id.*) (emphasis added). In contrast, respondents' confinement in administrative detention was not only related to a prosecution by the Federal Government; that prosecution was the sole reason for its imposition (or at least continuation) in the first place.

2. The Solicitor General Is Wrong When He Presumes A Security Basis For Respondents' Eight-Month Isolation In Administrative Detention. Finding no support in the records in this case, the Solicitor General suggests that inmates under criminal investigation may presumptively be deemed security risks because of the abstract possibility that they may impede the Government's investigation, and therefore, that their placement and detention in ADU is without constitutional significance (Pet. Brief 27-29). But the premise of that argument is at odds with decisions of this Court. In *Hughes v. Rowe*, 449 U.S. 5 (1980), an inmate of the Illinois State Penitentiary sought relief under 42 U.S.C. § 1983 for his commitment and detention in segregation without a prior hearing. His complaint had been summarily dismissed below in part because he was under criminal investigation at the time of his detention for the same conduct which resulted in his segregation. The dissenting opinion viewed this factor as sufficient reason to dispense with a hearing, noting that the bare possibility of "alibi construction and witness intimidation" would establish a conclusive basis for segregation (*id.* at 22). A majority of the Court sharply disagreed. It ruled that if the petitioner's allegations were true he would have a valid Section 1983 claim against his keepers, and in a per curiam

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A view identical to that in *Duke* was expressed in *United States v. Smith*, 464 F.2d 194, 196-97 (10th Cir.), *cert. denied*, 409 U.S. 1066 (1972), where the court rejected a speedy trial claim of inmates confined in administrative detention "for disciplinary reasons, for the protection of the victim, because of their previous harassment of other inmates, and to prevent the possibility of escape." The court held: "Segregated confinement for institutional reasons is not an arrest" (*id.* at 196-97) (emphasis added). Speedy trial claims were also rejected in *United States v. Mills*, 704 F.2d 1553, 1556 (11th Cir. 1983) and *United States v. Clardy*, 540 F.2d 439, 441 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976), where the confinement was "disciplinary segregation," and in *United States v. Manetta*, 551 F.2d 1352, 1354 (5th Cir. 1977) where, the court noted, administrative detention was imposed for reasons not appreciably different than in *Duke*. The only decision conceivably intimating a contrary view is *United States v. Blevins*, 593 F.2d 646 (5th Cir. 1979), where the defendant claimed he was "placed in administrative segregation pending institution of criminal proceedings." The decision is unclear, however, as to whether prison authorities had independent reasons for imposing the detention. See *id.* at 647 n.3. Cf. *United States v. Brooks*, 670 F.2d 148, 151 (11th Cir.), *cert. denied*, 457 U.S. 1124 (1982) (declining to reach the issue of whether placement "in disciplinary segregation constitutes an arrest for Speedy Trial Act purposes").

opinion it condemned the notion that all inmate-suspects may be presumed to be security risks:

"The dissent also speculates that inmates suspected of violations of prison regulations, if allowed to remain in the general prison population pending disciplinary proceedings, will fabricate alibi defenses and intimidate potential witnesses. [citations omitted]. This danger would apparently justify automatic investigative segregation of all inmate suspects. . . . While investigative concerns might, in particular cases, justify prehearing segregation, nothing in the present record suggests that these concerns were at work in this case." *Id.* at 13-14n.12.¹²

Further, the Government's presumption of dangerousness has been dismissed by the drafters of two model codes, who have wrestled with the legitimacy and fairness of isolating an inmate who has become the subject of a criminal investigation because of conduct committed at the institution. Both the American Bar Association and the National Conference of Commissioners on Uniform State Laws have rejected open-ended investigatory detention as being inimical to the interests of both the inmate and the institution. Instead, they advocate a prompt determination of whether an inmate is to be prosecuted and believe, as did the court of appeals, that investigatory preindictment segregation should be limited to ninety days. Beyond that period, administrative confinement may continue under their standards only if the prosecution obtains an indictment or files an information, at which time Sixth Amendment guarantees plainly attach.¹³

¹² See *Kelly v. Brewer*, 525 F.2d 394, 401 (8th Cir. 1975) (rejecting the contention that an inmate's conviction for murdering or attempting to murder a staff member "ipso facto establishes, prima facie, if not conclusively, that the inmate is a fit subject for administrative segregation for a prolonged and indefinite period of time"). See also *Hewitt v. Helms*, 103 S. Ct. 864, 874 n.9 (1983) (although isolation of an inmate pending resolution of misconduct charges may be necessary in particular cases to preserve the integrity of the prison investigation and disciplinary proceedings, periodic reviews of the confinement must be made to ensure that its continuation is justified); *id.* 881-82 (Stevens, J., dissenting) ("the mere notation on a record, 'there is an ongoing investigation,' should not automatically validate the continuation of solitary confinement").

¹³ See 4 ABA *Standards for Criminal Justice*, Legal Status of Prisoners, Standard No. 23-3.3(b) (adopted Feb. 9, 1981); National Conference of

When stripped of the Solicitor General's unsupportable security rationale, respondents' detention in ADU following the termination of prison disciplinary proceedings bears all the trappings of an arrest and accusation outside the prison walls. Indeed, the court of appeals' unassailable analogy to a conventional arrest and detention was conceded by the prosecutor in this case, who acknowledged to the district court that had respondents been at-large shortly after the Hall murder, he would have promptly ordered their arrest (JA 171). And, as he further conceded, once in custody respondents would have been entitled under Federal Rules of Criminal Procedure 5(a) and 44(a) to a prompt arraignment and the appointment of counsel (*id.*).

3. The Concepts of Arrest and Accusation Must Apply to Inmates Detained to Answer Impending Criminal Charges if the Sixth Amendment Is to Operate at All Within the Walls of a Prison. To say that respondents did not stand accused of a crime by virtue of their eight-month detention in ADU, and thus were not entitled to counsel, is to argue that the Sixth Amendment stops at the prison gate, a proposition repeatedly rejected by this Court. Indeed, in a closely analogous setting, this Court held that a prison inmate suspected of a crime, no less than a free man, is constitutionally entitled to the procedural safeguards afforded by the Sixth Amendment. *See, e.g., Smith v. Hooy, 393 U.S. 374, 377 (1969).*¹⁴

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Commissioners on Uniform State Laws, Model Sentencing and Corrections Act § 4-511, 10 U.L.A. 316 (Supp. 1983). *See also* National Sheriffs' Ass'n, *Inmates' Legal Rights* 38 (1974) (inmate suspect's custody status should be increased pending prosecution only "if it is believed that the inmate presents a threat to himself or other inmates or is an escape risk"). *See generally, Miller, Taking The Rule of Law To Prisons*, 64 A.B.A.J. 990, 992 (1978).

¹⁴ Speaking of the Speedy Trial Clause, the Court in *Smith v. Hooy* wrote: "There can be no doubt that if the petitioner in the present case had been at large for a six-year period following his indictment, and had repeatedly demanded that he be brought to trial, the State would have been under a constitutional duty to try him. *Klopfer v. North Carolina*, [386 U.S. 213, 219 (1967)]. And Texas concedes that if during that period he had been confined in a Texas prison for some other state offense,

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More importantly, the position seemingly espoused by the Solicitor General admits of no limitations. If the concepts of arrest and accusation do not apply to those already in custody under a lawful sentence, what prevents federal agents from removing an inmate-suspect to the nearest pretrial detention facility and holding him there indefinitely without counsel until the Government is prepared to indict? The one lower federal court to confront this situation categorically rejected this contention. In *United States v. McLemore*, 447 F. Supp. 1229 (E.D. Mich. 1978), defendant had escaped from a federal treatment center to which he had been transferred in anticipation of his release on parole. After being apprehended by FBI agents, who initially turned him over to the local police, defendant was returned to the Federal Correctional Institution at Milan, Michigan, where for nine months he was confined in the prison's detention unit pending indictment for escape. Finding that defendant's detention constituted an "accusation" for purposes of the Sixth Amendment, the court rejected the claim that because the defendant was at all times within "the legal custody and under the control of the Attorney General," see 18 U.S.C. § 4210(a), his seizure and detention by that same authority could not render him an "accused":

"To follow the government's logic, one would have to conclude that no prisoner or parolee would enjoy the protection of the Speedy Trial Clause before the bringing of formal charges — a proposition which strikes this Court as inconsistent with the spirit of *Smith v. Hooy*, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969). . . ." 447 F.Supp. at 1236.¹⁵

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its obligation would have been no less. But the Texas Supreme Court has held that because petitioner is, in fact, confined in a federal prison, the State is totally absolved from any duty at all under the constitutional guarantee. We cannot agree."

Cf. *Mathis v. United States*, 391 U.S. 1 (1968) (inmate serving a sentence for unrelated offense is nonetheless entitled to be free of uncounselled custodial interrogation).

¹⁵ Equally unavailing is the argument that the "[i]t is prison authorities, not prosecutors or police, who make the decision to place an inmate in administrative detention and to retain him there" (Pet. Brief 24). For purposes of

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In light of the nature of respondents' preindictment detention and the reason for it, the court of appeals justifiably concluded that respondent's prolonged confinement pending the return of formal charges was the equivalent of an arrest and rendered them "accused" in the course of a "criminal prosecution." The failure to appoint lawyers until arraignment under these circumstances violated the second prong of the Sixth Amendment test — namely, it denied respondents the effective assistance of counsel for their defense and, consequently, a fair trial.

B. Because the Prompt Appointment of a Lawyer Is Essential to Assure a Fair Trial for an Accused Inmate Confined in Administrative Detention, the Court Below Properly Declined to Suspend the Right to Counsel Until Indictment

The Sixth Amendment provides that an "accused" is entitled "to have the Assistance of Counsel for his defence." Although conceding for purposes of argument that as "accuseds" respondents would have been entitled to the "assistance of counsel," the Solicitor General maintains that the Government discharged its constitutional responsibility to them when at their arraignments eight months later it appointed lawyers to defend them. This view is premised on

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activating the Sixth Amendment, the agencies of the Federal Government act as a single sovereign. As the Fourth Circuit explained in *United States v. MacDonald*, 531 F.2d 196, 204 (4th Cir. 1976), *rev'd on other grounds*, 435 U.S. 850 (1978), in language seemingly approved by this Court, *see id.*, 456 U.S. 1, 10 n.11 (1982):

"For the purpose of determining whether the sixth amendment applies, it is immaterial that, although the Army initially accused and arrested MacDonald, the civilian arm of the government is currently prosecuting him. The prosecution of the same charge — murder — that the Army began was pursued by the Department of Justice. The sixth amendment, we hold, secures an accused's rights to a speedy trial against oppressive conduct by the government in its single sovereign capacity, regardless of the number and character of the executive departments that participate in the prosecution."

Cf. Commonwealth v. Chacko, 500 Pa. 571, 580 n.3, 459 A.2d 311, 513 n.3 (1983) (rejecting the argument that because interrogation of an inmate was conducted by "a member of the internal prison staff rather than a police officer," incriminating statements obtained in violation of *Miranda* were admissible).

the argument that regardless of the length of time the Government sequesters an accused to answer impending charges, and regardless of the extent to which prolonged pretrial detention will impair the accused's ability ultimately to defend himself at trial, the right to counsel does not attach until the Government initiates formal adversary judicial proceedings by way of arraignment, preliminary hearing, indictment, information or other formal charge (Pet. Brief 19-21).

This notion is foreign to our system of even-handed justice. See *Coleman v. Alabama*, 399 U.S. 1, 15-16 (1970) (Douglas, J., concurring) (noting with contempt the Soviet practice of detaining suspects incommunicado for up to nine months without counsel). In no American jurisdiction can an individual be arrested and detained to answer charges and yet for months and years be denied legal representation.¹⁶ The Solicitor General offers no rational explanation as to why the rules should be different here, and he misconstrues this Court's prior decisions to marshal support for his frightening suggestion of a connection between the "formality" of the charges and the right to assistance of counsel.¹⁷

¹⁶ In federal prosecutions, the prompt appointment of counsel for one arrested and detained is mandated by Fed. R. Crim. P. 5(a) and 44(a), which in combination require federal authorities to bring before a magistrate "without unnecessary delay" an individual they arrest and detain and to provide him with counsel at or before that initial appearance. Our research has confirmed that similar rules or practices are in force in each of the fifty states. The criminal codes of eight states (Arizona, Arkansas, Florida, Mississippi, North Carolina, Oregon, Washington and Wisconsin) require the appointment of counsel as soon as feasible after the defendant is taken into custody but in no event later than the initial appearance — which in all jurisdictions must be conducted without unreasonable delay (typically 24 to 72 hours). Nineteen other states provide for the appointment of counsel at the initial appearance (Alabama, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Vermont, West Virginia and Wyoming). The codes of the remaining states require that an indigent defendant be advised at the initial appearance of his right to request appointed counsel and we are advised by public defenders in these states that such a request would ordinarily be promptly honored. See also 1 ABA *Standards for Criminal Justice, Providing Defense Services*, Standard No. 5-5.1 (adopted Feb. 12, 1979) ("Counsel should be provided to the accused as soon as feasible after he is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest.")

¹⁷ Indeed, one must consider the potential, unsettling consequences were the Solicitor General's view accepted as constitutional doctrine. Save those

The Court has never subscribed to the view that no matter how long a suspect's pretrial detention, his right to counsel does not attach until the commencement of formal adversary proceedings. In *Kirby v. Illinois*, 406 U.S. 682 (1972), on which the Solicitor General principally relies, the Court simply declined to extend the *Wade-Gilbert* exclusionary rule to an identification show-up conducted during "a routine police investigation" of a suspect who the police had not even yet decided to detain to answer charges (*id.* at 690-91).¹⁸ The *Kirby* Court simply had no occasion to consider the right to

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precious barriers erected by the Sixth Amendment, little in the Constitution stands in the way of bringing the Gulag to this Nation. Though one taken into custody is entitled to a prompt, neutral determination that reasons exist to justify his arrest, those proceedings need not be adversary and counsel need not be appointed. See *Gerstein v. Pugh*, 420 U.S. 103, 114, 119-20 (1975). Thereafter, nothing in the Constitution mandates the prompt initiation of what the Solicitor General would view as a triggering event — formal charge, arraignment, preliminary hearing or indictment. Under the Solicitor General's view, a person could conceivably be sequestered for months at a time with no one to protest on his behalf and left to the remedy of challenging his prosecution under the Speedy Trial Clause when ultimately counsel was provided.

¹⁸ At the time of the identification show-up in *Kirby*, the defendant had merely been brought to the station house for questioning and further investigation. Not until after the show-up had been conducted did the police decide to hold him to an answer (406 U.S. at 684 & n.1). Thus, under the Court's *Marion* analysis, the defendant in *Kirby* was not even "accused" at the time he claimed to have been denied his right to counsel. Moreover, a number of lower federal courts have interpreted the language of the plurality opinion in *Kirby* on which the Solicitor General relies to mean that arrest and detention can trigger the right to counsel even prior to the return of formal charges depending on the extent to which the forces of the state have "solidified in a position adverse to that of the accused." *Lomax v. Alabama*, 629 F.2d 413, 416 (5th Cir. 1980), *cert. denied*, 450 U.S. 1002 (1981); see *Hall v. Iowa*, 705 F.2d 283, 290 (8th Cir.), *cert. denied*, 104 S.Ct. 339 (1983); *Clark v. Jago*, 676 F.2d 1099, 1111-12 n.16 (6th Cir. 1982); *United States ex rel. Robinson v. Zelker*, 468 F.2d 159, 163 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973). Cf. *United States ex rel. Burton v. Cuyler*, 439 F.Supp. 1173, 1181 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1278 (3d Cir. 1978) ("We do not believe . . . that by simply delaying the occurrence of an arraignment or preliminary hearing (as was done in this case, presumably because [the defendant] was in custody on another charge) the state can in effect suspend the right to counsel until it has neatly tied its case together . . .")

counsel implications of prolonged preindictment confinement such as was the case here.¹⁹

Far from the wooden approach suggested by the Solicitor General, this Court has consistently held that an accused's right to counsel attaches whenever necessary to assure the fairness of his trial. As the Court wrote in *United States v. Wade*, 388 U.S. 218, 224-25 (1967):

"The guarantee reads: 'In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.' (Emphasis supplied.) The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful defence'."²⁰

Drawing upon *Powell v. Alabama*, 287 U.S. 45 (1932), which refused to confine the scope of the Counsel Clause to the trial itself, the *Wade* Court explained:

"It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with

¹⁹ Similarly, the Solicitor General alludes to dicta when he cites post-*Kirby* cases in support of his argument. In each, no question was raised as to whether the Sixth Amendment right to counsel had attached by the time of the event in question. Rather, the issue was whether the state by specified conduct had violated that right. See *Estelle v. Smith*, 451 U.S. 454, 469 (1981) (a post-indictment Sixth Amendment issue); *Moore v. Illinois*, 434 U.S. 220, 227 (1977) (right to counsel at show-up conducted at preliminary hearing); *Brewer v. Williams*, 430 U.S. 387, 399 (1977) (a post-arraignment Sixth Amendment issue).

²⁰ Accord, *United States v. Mandujano*, 425 U.S. 564, 603-04 (1976) (Brennan, J., concurring); *United States v. Ash*, 413 U.S. 300, 310 (1973); *Schneekloth v. Bustamonte*, 412 U.S. 218, 239 (1973); *Coleman v. Alabama*, 399 U.S. 1, 7 (1970).

our adversary theory of criminal prosecution. Cf. *Pointer v. Texas*, 380 U.S. 400." 388 U.S. at 226-27.

Determining whether an accused subject to long-term pre-indictment confinement is constitutionally entitled to counsel thus necessarily turns not on some mechanistic test as suggested by the Solicitor General but rather on whether the presence of counsel prior to indictment is necessary to assure the accused a fair trial. Over the past fifty years, this Court has developed an approach to answering that question. As explained in the carefully crafted opinion in *United States v. Ash*, 413 U.S. 300, 313-17 (1973), each pretrial setting must be critically examined on two levels: first, to determine whether the absence of counsel during that particular pretrial phase would deprive the accused of the kind of assistance historically contemplated by the Counsel Clause; and second, to determine whether counsel's presence at some later juncture is an effective remedy or counterbalance for his earlier absence. On the facts of this case, those questions veritably answer themselves; for as the court of appeals noted, respondents' uncounselled detention irremediably deprived them of the opportunity, fundamental to the right to have the assistance of counsel, to pursue, prepare and preserve a defense.

1. The Absence of Counsel During Respondents' Eight-Month Confinement in Administrative Detention Denied Them the Assistance of Counsel to Prepare a Defense. This Court has repeatedly recognized that a fundamental facet of adequate representation in a criminal case is the investigation and preparation of a defense. As early as *Powell v. Alabama*, the Court held that fairness at trial compels the appointment of counsel sufficiently in advance of the trial so as to afford the attorney a meaningful opportunity to investigate, to probe for evidence and to prepare a defense for his client. In *Powell*, the Court held that the failure to appoint counsel until the eve of trial deprived the defendants of representation during the "critical period . . . when consultation, thoroughgoing investigation and preparation were vitally important" (287 U.S. at 57). Further, the Court ruled that subsequent appointment at trial was no substitute: "Neither [counsel] nor the court could say what a prompt and thor-

oughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given" (*id.* at 58).²¹

So fundamental is thorough investigation to an accused's constitutional right to effective assistance of counsel that the lower federal courts have regularly set aside convictions when by neglect or otherwise defense counsel has failed to pursue evidence potentially beneficial to his client.²² The organized bar too has long recognized that a probing and exhaustive in-

²¹ Writing of *Powell*, Mr. Justice Rehnquist observed in *United States v. Henry*, 447 U.S. 264, 291 (1980) (dissenting opinion):

"[T]he defendants in *Powell* 'did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself'. . . . They thus were deprived of the opportunity to consult with an attorney, and to have him investigate their case and prepare a defense for trial. After observing that the duty to assign counsel 'is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case,' [287 U.S.] at 71, this Court held that the defendants had been unconstitutionally denied effective assistance of counsel."

See *Hawk v. Olson*, 326 U.S. 265, 278 (1945) ("The defendant needs counsel and counsel needs time"); *Avery v. Alabama*, 308 U.S. 444, 446 (1940) ("[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.") Cf. *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (requiring the presence of counsel at the preliminary hearing in part because "trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial").

In *Powell* and again in *Wade*, the Court traced the historical antecedents of the Counsel Clause to discredit the notion that the framers of the Sixth Amendment intended counsel's role to be limited to guiding his client through the intricacies of procedural and substantive law. See 287 U.S. at 60-65; 388 U.S. at 224-25. Reacting against English common law rules that confined counsel's responsibility to advising the accused in "matters of law," at the time the Bill of Rights was adopted the constitutions of at least 11 of the 13 states had abolished this limitation and expanded counsel's role to include investigating, marshalling and presenting the facts. See W. Beaney, *Right to Counsel in American Courts* 8-26 (1955); Note, *An Historical Argument for the Right to Counsel during Police Interrogation*, 73 Yale L.J. 1000, 1030-34 (1964). Further, the *Powell* Court quoted Zephaniah Swift's 1795 observation, "It is manifest that there is as much necessity for counsel to investigate matters of fact, as points of law, if truth is to be discovered." 287 U.S. at 64 n.

²² See e.g., *Washington v. Strickland*, 693 F.2d 1243, 1251 (5th Cir. 1982) (en banc), cert. granted, 103 S.Ct. 2451 (No. 82-1554, 1983); *Ford v. Parratt*,

vestigation of the facts is an essential part of the assistance to which an accused is constitutionally entitled. For example, the American Bar Association's standards for defense counsel provide: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt and penalty."²³ Although perhaps self-evident, the logic of these rules was most apply summarized in *Goodwin v. Swenson*, 287 F.Supp. 166, 182-83 (W.D. Mo. 1968):

"The most able and competent lawyer in the world can not render effective assistance in the defense of his client if his lack of preparation for trial results in his failure to learn of readily available facts which might have afforded his client a legitimate justiciable defense."

2. Belatedly-Appointed Counsel for an Inmate Long Held Incommunicado in Administrative Detention Cannot Overcome the Investigatory Obstacles and Other Disadvantages that Result from Delay in Commencing the Preparation of a Defense. Admittedly, the right to counsel does not attach at every pretrial stage at which an uncounselled accused can be

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638 F.2d 1115, 1117-18 (8th Cir.), *vacated on other grounds*, 434 U.S. 934 (1981); *United States v. Golub*, 638 F.2d 185, 189-90 (10th Cir. 1980); *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981); *United States v. Porterfield*, 624 F.2d 122, 124 (10th Cir. 1980); *Davis v. Alabama*, 596 F.2d 1214, 1217-18 (5th Cir. 1979), *vacated as moot*, 446 U.S. 903 (1980); *Ewing v. Williams*, 596 F.2d 391, 393-94 (9th Cir. 1979); *Rummel v. Estelle*, 590 F.2d 103, 104-05 (5th Cir. 1979); *Wood v. Zahradnick*, 578 F.2d 980, 982 (4th Cir. 1978); *Gaines v. Hopper*, 575 F.2d 1147, 1150 (5th Cir. 1978); *Morrow v. Parratt*, 574 F.2d 411, 413 (8th Cir. 1978); *Thomas v. Wyrick*, 535 F.2d 407, 413-14 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976); *McQueen v. Swenson*, 498 F.2d 207, 212-13 (8th Cir. 1974); and *Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972). Indeed, even Judge Wright, who authored the dissenting opinion below, has recognized the vital importance of early and thorough preparation of the defense. In a decision ordering the pretrial release of a juvenile who claimed that there were many potential defense witnesses he could not identify by name but would recognize by sight, Judge Wright observed: "The ability of an accused to prepare his defense by lining up witnesses is fundamental, in our adversary system, to his chances of obtaining a fair trial." *Kenney v. Lenon*, 425 F.2d 209, 210 (9th Cir. 1970).

²³ 1 ABA, *Standards for Criminal Justice*, The Defense Function, Standard No. 4-4.1 (adopted Feb. 12, 1979).

disadvantaged, but rather only when the subsequent appointment or presence of an attorney is inadequate to remove the "inequality in the adversary process" resulting from his earlier absence. *United States v. Ash*, 413 U.S. at 319; see *United States v. Wade*, 388 U.S. at 227-28. For example, the Court in *Ash* held that an accused's right to counsel will not ordinarily extend to the prosecutor's routine trial preparation interviews with witnesses where defense counsel has an equal ability "to seek and interview witnesses himself" (413 U.S. at 318).

With respect to prolonged preindictment detention without counsel, the question thus must be asked: Can an accused inmate, who has been placed and detained indefinitely in solitary confinement pending indictment, reasonably be assured a fair trial by virtue of the appointment of counsel months or years later when formal charges are ultimately brought? Because of the salutary effect of procedural rules which outside the prison walls proscribe long-term pretrial detention without counsel (see *supra*, at 22 note 16), few cases shedding light on this question have arisen. In the rare instance in which one has, however, the courts have condemned the absence of counsel during a prolonged period of pretrial confinement. For example, in *Chism v. Koehler*, 527 F.2d 612 (6th Cir. 1976), *aff'g* 392 F.Supp 659 (W.D. Mich. 1975), *cert. denied*, 425 U.S. 944 (1976), defendant was held in pretrial confinement for over a year while he was forced to litigate his right to appointed counsel. The Sixth Circuit sustained a grant of habeas relief from the ensuing conviction, and adopted the opinion of the district court, which had held that defendant's detention and lack of representation combined to deprive him of a fair trial:

"During the fifteen months that petitioner was incarcerated without the assistance of trial counsel, he was without means to effectively marshal his defense. He had no way of locating and interviewing witnesses while their memories were fresh. There was no one to gather and preserve evidence which might have been favorable to the defense. Meanwhile, the State was proceeding in the case with all the investigative expertise and resources at its disposal. Such

an imbalance strikes at the very essence of evenhanded criminal justice." 392 F.Supp. at 667.²⁴

See United States v. Dolack, 484 F.2d 528, 530-31 (10th Cir. 1973) (dismissing an indictment on right to counsel grounds against an accused who despite his repeated requests, was denied counsel for thirteen months while serving a sentence in Canada for an unrelated offense and who was therefore deprived of the ability "to secure witnesses [and] other evidence"). *See also Cobb v. Aytch*, 643 F.2d 946, 957-62 (3d Cir. 1981) (en banc) (transfer of pretrial detainees to remote prisons violated their right to effective assistance of counsel because such transfers "interfered with what the prisoners could do to help themselves [and] even more drastically with what counsel might have been able to do for them").²⁵

In mandating the appointment of counsel for an accused inmate who is isolated pending indictment (or, alternatively, requiring his release from segregation) the court of appeals echoed these concerns. But it also noted the unique "investigatory obstacles" that confront the defense of a prison case, and it found that because of them prolonged preindictment segregation serves "to deny an inmate the opportunity to take steps to preserve his or her own defense" (Pet. App. 11a-

²⁴ To the same effect are the observations of this Court in *Smith v. Hooy*, 393 U.S. 374, 379-80 (1969):

"[I]t is self-evident that 'the possibilities that long delay will impair the ability of an accused to defend himself' are markedly increased when the accused is incarcerated in another jurisdiction. Confined in a prison, perhaps far from the place where the offense covered by the outstanding charge allegedly took place, his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired. And, while 'evidence and witnesses disappear, memories fade, and events lose their perspective,' a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time."

²⁵ The Solicitor General observes that many other suspects find themselves similarly disadvantaged — *i.e.* the target of an undisclosed investigation, the suspect serving time who is being investigated for an offense committed outside of prison, an inmate-suspect who has legitimately been transferred to another correctional institution (Pet. Brief 31, 35-36) — and that the court of appeals' decision militates for the appointment of counsel for them as well. The critical difference, of course, is that these suspects have not been held to answer impending criminal charges and thus are not "accuseds" constitutionally entitled to have the assistance of counsel in the first place.

12a). Importantly, the court found these handicaps irremediable by the appointment of counsel months or years later at the time of indictment (Pet. App. 16a). The Solicitor General maintains that the court of appeals grossly exaggerated the handicaps imposed on counsel appointed to defend an inmate who months or years before was isolated in ADU pending the return of formal charges. But if anything, the opinion of the court below understates them.

Endemic to the defense of prison cases is the constantly shifting composition of the prison population. The court of appeals' characterization of the inmate population as "transient" is not without sound foundation. While the average federal inmate population in fiscal year 1981 was 24,933, during that year authorities committed 16,840 new inmates and discharged, either out of the system or from one prison to another, 10,639. Compared to the average inmate population, newly-admitted inmates comprised 67.5%, while those exiting the system (or moving within it) represented 42.7%.²⁶ In state institutions, the turnover is even greater. For example, during 1981 the mean average inmate population in state facilities was 313,181. During that year, state authorities committed 198,288 new inmates — almost two-thirds of the average — and discharged 162,537 — in excess of one-half.²⁷

The impact of these statistics is apparent. If an inmate has been isolated for twelve months in federal administrative detention, his attorney can reasonably anticipate that in excess of four out of each ten inmates he wishes to interview will have long ago departed the institution. If the defendant is in state custody, the chances that an inmate-witness will have been discharged are better than even.

²⁶ See Federal Bureau of Prisons Inmate Information Systems, Report Nos. 70.53 ("Report of Man Days") and 71.02 ("Report of Commitments and Discharges") (1983). The comparable statistics for fiscal 1982 and 1983 are as follows:

	1982	1983
Average Population	27,730	29,718
New Commitments	19,496	21,677
New Commitments as a %	70.3%	72.9%
Discharges	11,784	12,479
Discharges as a %	42.5%	42.0%

²⁷ See U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners In State and Federal Institutions on December 31, 1981*, Tables 1 and 12 (March 1983).

The handicaps under which defense counsel consequently must operate are not minimized by rosters and locator services, which may or may not be available or reliable.²⁸ To the extent that the prosecution can provide such information and to the extent that it is accurate,²⁹ it is typically unhelpful in light of the reality that prisoners know one another not by legal identities but by institutional nicknames. *See generally*, D. Clemmer, *The Prison Community* 91-93 (1940). In this case, not only were prison authorities unable to match legal names with sobriquets; they actually sought to enlist defense counsel to assist in compiling such a directory (JA 150).

To these obstacles must be added those which are far more difficult to document but which inevitably result from the nature of the prison environment and its constituents. As numerous social scientists have observed and reported, and as recognized by many courts, the value system within a prison is vastly different from that of the world outside.³⁰ Living in an environment of unrelenting tension, fear, distrust, suspicion and retaliation, inmates operate under a code unique to the institution the quintessential aspects of which are noninvolvement and noncooperation. The principal targets of the code, of course, are members of the prison staff as well as

²⁸ In speaking of these aids, the Solicitor General consistently notes only that they "may be available" (Pet. Brief 42). Frequently, they are not. *See, e.g., United States v. Morrison*, 518 F.Supp. 917 (S.D.N.Y. 1981).

²⁹ An interesting commentary on the reliability of institutional data was provided by an author who studied the New Mexico State Prison uprising. In the aftermath of the riot, "according to the department's own alarming documents, 20 men were still unlocated entirely, eight others were not where official lists had them, five were unaccountably shown to have been paroled months ahead of eligibility, and six were supposed to be in federal prisons that had no record of ever receiving them." *Los Angeles Times*, Dec. 19, 1983, Pt. V (Book Review) at 22 (quoting Roger Morris).

³⁰ *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 561-562, 586-587, 596-597 (1974); *Pugh v. Locke*, 406 F.Supp. 318, 325 (M.D. Ala. 1976), *aff'd sub nom., Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *modified sub nom., Alabama v. Pugh*, 438 U.S. 781 (1978); *Landman v. Royster*, 333 F.Supp. 621, 646 (E.D. Va. 1971); *Missouri v. Green*, 470 S.W.2d 565, 569 (Mo. 1971), *cert. denied*, 405 U.S. 1073 (1972); L. Bowker, *Prison Subcultures* (1977); D. Clemmer, *The Prison Community* (1940); J. Irwin *Prisons in Turmoil* 11-36 (1980); *The Prison* (D. Cressey ed. 1966); *Theoretical Studies in the Social Organization of the Prison* (R. Cloward ed. 1960).

other symbols of society's authority, who are never to be accorded respect or prestige and are to be "treated with constant suspicion and distrust."³¹ However, as suggested by prison axioms such as "Do your own time," the inmate code permits prisoners to manifest little loyalty to one another.³² Thus, as numerous first-hand observers have reported, when faced with the choice of intervening on behalf of another inmate — particularly when to do so would require taking a position adverse to the administration — most inmates will decide simply not to get involved.³³

In tension with the inmate code, however, is what students of prison society have identified as the primary drive of all inmates. As Donald Clemmer reported in his now classic study of the prison environment, unlike the world outside which values "success, service, truth, kindness, and so forth," within the institution "[t]he greatest and only universal purpose is for freedom."³⁴ Freedom is not defined solely in terms of obtaining outright release, or even a shorter sentence or preferential treatment. Inmates are also motivated to an extent not imaginable outside the institution by revenge or retaliation for prior actions, or simply in order to get rid of someone seen as dangerous or threatening to an inmate's

³¹ Sykes & Messinger, "The Inmate Social System," in *The Sociology of Corrections* 97, 100 (1977) [hereafter "Sykes & Messinger"]; see L. Bowker, *supra* note 30, at 135 n. 79; Cloward, "Social Control in the Prison," in *The Sociology of Corrections*, *supra*, 110, at 129 [hereafter "Cloward"].

³² See Testimony of Prof. Edward C. Weeks (Tr. 1141-42) [hereafter "Weeks' Testimony"]; N. Leopold, *Life Plus Ninety-Nine Years* 141 (1958); Sykes & Messinger, *supra* note 31, at 99-100.

³³ See e.g., Colson, "Towards an Understanding of Imprisonment and Rehabilitation," in *Crime and the Responsible Community* 152, 160 (1980); Hyland, "Diagnosis: Extreme Alienation," in *Inside: Prison American Style* 46, 48 (R. Minton, Jr. ed. 1971); Maguire, "Racism II," in *Inside: Prison American Style*, *supra*, at 84; Weeks' Testimony (Tr. 1141-42).

³⁴ D. Clemmer, *The Prison Community* 151 (1940). According to two other commentators, inmates are motivated by the goal of "serving the least possible time and enjoying the greatest number of pleasures and privileges while in prison." Sykes and Messinger, *supra* note 31, at 99. See generally, G.M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison* 106-08 (1958) (hereafter "Sykes").

safety.³⁵ As another social scientist points out, because inmates are not constrained by considerations of truthfulness, the prisoner who provides information about a fellow-inmate "may be a liar as well as a betrayer and he threatens the innocent as well as the guilty."³⁶

It is in this context that the question of an accused inmate's need for early representation must be considered. See *Wolff v. McDonnell*, 418 U.S. 539, 562 (1974).³⁷ Isolated from the remainder of the population, an inmate held in ADU without counsel is likely to be disadvantaged in two critical respects. First, as apparent from the previous discussion, there is an enormous temptation on the part of inmates, whether they have actual knowledge of the facts or not, to attempt to discern what they believe prosecution investigators want to hear and then to broker their testimony in exchange for a concession, be it a reduced sentence, a favorable transfer or merely the "hope . . . to preclude bodily harm, receive amnesty for their own indiscretions or retaliate against real or imag-

³⁵ See L. Carroll, *Hacks, Blacks and Cons* 84 (1974); Cloward, *supra* note 31, at 124-25; Cressey & Krassowski, *Inmate Organization and Anomie in American Prisons and Soviet Labor Camps*, 5 Soc. Probs. 217, 218-19 (1958); Sykes, *Men, Merchants and Toughs: A study of Reactions To Imprisonment*, 4 Soc. Probs. 130, 134-35 (1956).

³⁶ Sykes, *supra* note 34, at 89. Indeed, according to sociologists who have studied the prison environment, the chief impediment to collecting accurate data is the inability of a researcher to rely on information an inmate divulges to a person in authority. See D. Ward & G. Kassenbaum, *Womens Prison: Sex and Social Structure* 245 (1965); W. Williams & M. Fish, *Convicts, Codes, and Contraband* xxii (1974); Morris, "The Sociology of the Prison," in *Criminology in Transition* 69, 85 (1965).

³⁷ To all of this must be added "[t]he atrocities and inhuman conditions of prison life in America," *United States v. Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting), including the constant threat of brutality and violence by and towards both prisoners and guards and the frequent harassment and retribution by prison officials against prisoners who inconvenience them. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring); *Stevens v. Ralston*, 674 F.2d 759, 760 (8th Cir. 1982); *Bono v. Saxbe*, 450 F.Supp. 934, 943 (E.D. Ill. 1978), *modified*, 620 F.2d 609, 617 (7th Cir. 1980); *Laaman v. Helgemoe*, 437 F.Supp. 269, 305-306 (D.N.H. 1977); *Landman v. Royster*, 333 F.Supp. 621, 627, 628, 631, 633-637, 650 (E.D. Va. 1971); *Sostre v. Rockefeller*, 312 F.Supp. 863, 869-871 (S.D.N.Y. 1970), *modified*, 442 F.2d 178 (2nd Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

ined aggressors.³⁸ While some of this information may be truthful, much may not be; and the passage of time before someone inquires on behalf of the accused makes discerning one from the other that much more difficult. Further, as time lapses without witnesses being interviewed and statements taken, potentially untruthful inmates are afforded greater opportunity to assess how a situation can be turned to their advantage and to seize the occasion.³⁹

Even more unfair to the accused inmate are the forces that operate on potential witnesses who are in possession of information likely to be helpful to the defense. As noted before, such inmates are unlikely to volunteer what they know to prison personnel and police investigators not only because of an inmate code which proscribes cooperation generally and which compels an inmate to avoid becoming involved in another's affairs, but also because merely speaking with authorities will open an inmate to charges of being an informer.⁴⁰ As a result, the Government's investigation of a prison crime, no matter how thorough and impartially conducted, necessarily becomes one-sided. Cooperating inmates by definition will be those who prepared to provide information damaging to the accused, while potential defense witnesses will be excluded by a process of self-selection. Thus, unlike the situation outside the prison, counsel appointed for the accused inmate cannot assume that merely because the Government has fairly and fully investigated, potentially exculpatory witnesses will have been identified and their testimony preserved.

³⁸ Guenther & Guenther, "'Screws' vs. 'Thugs,'" in *Criminal Behavior and Social Systems* 511, 525 (2d ed. 1976).

³⁹ We do not mean to suggest that prosecutors would deliberately solicit or make use of false testimony. The fact of the matter is, as one study revealed, "officials may find themselves being manipulated by their prisoners into a position where they are serving unintentionally as a weapon in the battles taking place among the inmates. There is always the danger that they will be gulled in the process. . . ." Sykes, *supra* note 34, at 89. See also Sykes, *Men, Merchants and Toughs: A Study of Reactions To Imprisonment*, 4 Soc. Probs. 130, 134 (1956). Indeed, this is a common experience among prison therapists. See e.g., Bogan, *Client Dissimulation: A Key Problem in Correctional Treatment*, 39 Fed. Probation 20, 20-22 (1975).

⁴⁰ See Cloward, *supra* note 31, at 129. Furthermore, a prisoner may rightly be concerned about how any information he may volunteer may be used. Any testimony tending to absolve one potential defendant is quite likely to help incriminate another, and hence, be likely to open the witness to retaliation.

Further, the unseen forces that operate within a prison serve not only to conceal potential defense witnesses but frequently to neutralize them. Because of the prison ethic "do your own time," rather than divulge information favorable to a fellow inmate, a prisoner interrogated by prison authorities or prosecution investigators is far more likely to deny knowledge altogether and, if necessary, to fabricate a story to distance himself from the events in question.⁴¹ With no one developing testimony on behalf of the accused until months or years later, potential defense witnesses are likely to be either neutralized by prior, inconsistent statements or unwilling to testify for fear that they will be punished or prosecuted for their earlier, false statements.

Against the backdrop of a shifting institutional population, inmate anonymity, the reluctance of inmates to come forward with exculpatory information, their willingness to broker testimony regardless of its truth and their inclination to lie rather than get involved, an enormous tactical advantage lies with the prosecution when for months or years it alone has access to the inmate population and the ability to investigate. The unrepresented inmate held in solitary confinement, by contrast, has no one on his behalf to identify witnesses, to preserve favorable testimony, to counterbalance the corrupting influences that may lead a prosecutor unwittingly to induce fabricated testimony, or to discourage potential defense witnesses from naively providing a basis for their later impeachment. Instead, he is relegated to an investigation conducted long after the fact when potentially critical witnesses are long gone and the testimony of those that remain is indelibly fixed.

⁴¹ See, e.g., Weeks' Testimony (Tr. 1141-42). Indeed, in this case deliberate attempts to neutralize potential defense witnesses in this fashion continued even after the appointment of counsel. Purportedly for the purpose of scheduling witness interviews, prison authorities required defense counsel to provide in advance of their arrival at the institution a list of the inmates with whom they wished to speak. In fact, these lists were routinely provided to FBI agents who would then interrogate potential defense witnesses before they could be interviewed by the defense counsel. Forced to submit to these FBI interviews (a privilege not afforded to the defense until the court so ordered), these inmates typically disclaimed any knowledge of the Hall murder. See Defendants' Motion for Protective Order 4-6, 9-11 (CR 41).

The Solicitor General nonetheless argues that the inmate held in isolation pending indictment may avail himself of opportunities to investigate and preserve testimony. First, it is suggested that the inmate may provide a full account to FBI investigators. Aside from ignoring that such self-help would first require the inmate to waive Fifth Amendment safeguards⁴² — and, by cooperating with officials, to behave in a way contrary to the institutional ethic — the suggestion is ironic. Prior to being interrogated by FBI agents on the evening of the Hall murder, respondents were advised that they had the right first to consult with counsel, retained if they could afford it, appointed if not. When respondents asked to speak with lawyers, however, the agent in charge summarily terminated the interview (JA 128).⁴³

The Solicitor General alternatively suggests that an isolated inmate may enlist the assistance of a staff member who, during disciplinary proceedings, is available to collect evidence on behalf of the inmate. Putting aside the conflict inherent in asking a member of the prison staff to assist an inmate in disproving charges preferred by a fellow-employee,⁴⁴ the suggestion is wholly unrealistic. In the first place, institutional pressures make it impossible to expect that an inmate-suspect would repose trust in a representative of the administration, no less authorize a staff member to approach prisoners on his behalf. To suggest otherwise is

⁴² Cf. *Simmons v. United States*, 390 U.S. 377, 394 (1968) ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.")

⁴³ For many of the same reasons, it is unrealistic to suggest that the accused inmate can make a record of his defense by testifying at the prison's disciplinary hearing. A committee of the American Bar Association has also criticized this as creating for the inmate a "cruel dilemma":

"[I]f he testifies in that hearing, the testimony is admissible in [any] later criminal proceeding; if he does not testify, he is almost assured of being found in violation of prison regulations and subject to severe penalties."

ABA Joint Committee on the Legal Status of Prisoners, Standard No. 3.3, Commentary (Tent. Draft), reprinted in 14 Am. Crim. L. Rev. 377, 454 (1977).

⁴⁴ Several courts have commented on the "siege mentality" within the institution, on the part of prison staff members no less than on the part of prisoners. See, e.g., *Landman v. Royster*, 333 F.Supp. 621, 645-46 (E.D. Va. 1971). Further, as noted by one candid lawyer employed by the State

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to deny the reality that, as perceived by prisoners, prison personnel are to be viewed with suspicion and distrust. Further, using a staff member as an intermediary to communicate with fellow-inmates and thereby involve another inmate in one's own problem would transgress the prison code. As respondent Mills explained in characteristic understatement, "The inmates with whom you must live on a daily basis respond very badly to having their name given out in that manner" (JA 130). Finally, it belies reality to expect that an inmate so approached would perceive the staff member as a legitimate intermediary even were the inmate prepared to risk being labeled a "snitch" or to open himself to retaliation for unwittingly implicating someone else.

Contrary to the Government's view, there is no adequate counterbalance to an aggressive prosecutive investigation short of providing counsel for an inmate who by virtue of his isolation has been disabled from undertaking his own investigation.⁴⁵ The court of appeals recognized this. Con-

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of Texas to provide legal assistance to inmates, staff members cannot reasonably be expected to advocate against the administration:

"[a]s employees, we do not believe that we can honestly represent inmates who wish to sue prison officials, to prosecute that litigation if we are working with, eating with, and in some cases living on the units with other prison officials, and I think the personal conflicts there are pretty obvious."

Quoted in *Hooks v. Wainwright*, 536 F.Supp. 1330, 1348 (M.D. Fla. 1982). Additionally, reliance on a staff member presents the same Fifth Amendment dilemma for the inmate as speaking with the FBI or testifying before a disciplinary committee. Indeed, Bureau of Prisons regulations appear to prohibit the staff member from discussing the incident with his "client" without first admonishing the inmate that his statements may be used against him and without first obtaining FBI approval. See 28 C.F.R. § 541.41(b)(1); U.S. Dep't of Justice, Federal Prison System, Program Statement No. 5507.1 (Feb. 19, 1968).

⁴⁵ We do not mean to suggest that assuring fairness at the eventual trial compels that the inmate-suspect be afforded absolute parity with the Government in terms of the commencement of an investigation or its thoroughness. On the other hand, as Judge Charles Wyzanski observed in a similar setting (negligent failure of defense counsel to conduct an investigation):

"[The Constitution] does not leave the poor to a representation which is in any aspect — pretrial, investigatory, trial, or otherwise — shockingly inferior to what may be expected of the prosecution's representation. While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), cert. denied, 423 U.S. 876 (1975).

sistent with this Court's teaching in *Powell* that the obligation to provide counsel "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation . . . of the case" (287 U.S. at 71), the court of appeals struck a reasonable balance. True to the language of the Sixth Amendment, the en banc opinion requires appointment of counsel for an indigent inmate confined in ADU only after he establishes that legitimate security concerns have ceased to exist and that his detention has been continued to hold him to answer impending criminal charges. And in no event need counsel to be appointed or, alternatively, the inmate released back into the general prison population within the first ninety days of his incarceration — a period plainly adequate to permit tempers to cool, for prison authorities soberly to assess the need for disciplinary or remedial action and for the Government to determine whether it intends ultimately to prosecute.

II. BECAUSE RESPONDENTS' PROLONGED, UNCOUNSELLED SEGREGATION PENDING INDICTMENT SIGNIFICANTLY IMPAIRED THEIR RIGHT TO A FAIR TRIAL, THE COURT OF APPEALS PROPERLY DISMISSED THE CHARGES AGAINST THEM

Having scrupulously monitored this case throughout its pretrial phase, the district court concluded that respondents' eight-month isolation without counsel had irreparably deprived them of an opportunity for a fair trial:

"Defendants' eight-month detention in ADU, their total segregation from the general prison population and the government's refusal to appoint counsel or some other neutral investigator on their behalf combined to prejudice irreparably the defendants' ability to prepare for trial and to contest the charges against them. Specifically, defendants have been prejudiced by the dimming of memories of witnesses who could have substantiated their alibi; by the irrevocable loss of inmate witnesses known to the defendants only by prison "nicknames" now long-since transferred to other institutions or released from custody altogether; and by the deterioration of physical evidence essential to corroborate the defendants' testimony and to

rebut the evidence against them. In short, because of their belated appointment, and because of the transitory nature of the prison population, defense counsel simply did not have the opportunity to make the kind of investigation that the government made. The handicaps under which the defense must now operate cannot be remedied at this late date" (Pet. App. 46a-47a).

Following respondents' convictions, the court of appeals conducted an independent review of the record which also convinced it that respondents' prolonged isolation without counsel "unconstitutionally obstructed [their ability] to defend themselves at trial" (Pet. App. 23a). Under standards established by this Court, no basis exists for disturbing the court of appeals' order of dismissal.

A. The Courts Below Had Substantial Basis for Concluding that Respondents' Denial of Counsel Significantly Impaired Their Attorneys' Ability to Provide Effective Representation

In *United States v. Morrison*, 449 U.S. 361 (1981), this Court had recent occasion to reassess the standards for dismissal of an indictment on account of a right to counsel violation. Unlike the present case, *Morrison* involved not a denial of counsel at any critical stage, but the unauthorized intrusion of federal agents into an attorney-client relationship. With full knowledge that respondent was represented by retained counsel, agents of the Drug Enforcement Agency twice approached respondent, sought her cooperation in a related investigation and disparaged the abilities of her retained attorney (*id.* at 362). On neither occasion did respondent make any incriminating statements or supply the agents with any information concerning her case (*id.* at 362-63). Nonetheless, respondent moved to dismiss the indictment, citing only the egregious behavior of the federal investigators and contending only that the agents had interfered with her right to counsel in some unspecified way (*id.* at 363).

Reversing the dismissal order entered by the Third Circuit, the Court observed:

"The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse

effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial." *Id.* at 365.

This case is light-years removed from *Morrison*. First, unlike *Morrison*, which presented merely an unauthorized and unfruitful intrusion into an existing attorney-client relationship, respondents in this case were denied representation entirely for up to twenty months during what the court of appeals characterized as a period "critical to [respondents'] ability to prepare and preserve a defense" (Pet. 12a).

Second, again in marked contrast to *Morrison*, respondents adduced abundant evidence that the Sixth Amendment violation had rendered their belatedly-appointed lawyers unable to provide the assistance at trial that the Constitution requires. In pleadings submitted to the district court, defense counsel chronicled their inability some ten months after the murder to investigate the charges against their clients and to probe for exculpatory evidence. Helpful witnesses known only by jailhouse monikers had been transferred to other institutions or released from custody altogether, and thus were irretrievably placed beyond the reach of defense counsel (JA 125, 150-51). Many of the witnesses located by counsel were insufficiently confident of their recollections a year after the fact to run the risk of what they viewed as certain reprisals by prison officials.⁴⁶ Other witnesses, who immediately after the murder sought to deflect prosecution investigators by concocting false stories to distance themselves from the events in question, declined to testify in light of their own potential

⁴⁶ For example, one inmate interviewed by defense counsel believed that the Government's principal non-inmate identification witness had contradicted himself during a private conversation, but the inmate was insufficiently certain of the details of the discussion to risk incurring the wrath of prison officials (or, as FBI agents had admonished him, being prosecuted for perjury) by testifying (JA 153). For similar reasons, another inmate declined to swear to his recollection of a conversation that took place prior to the Hall murder during which the Government's principal inmate witness threatened to seek revenge against respondent Mills for his refusal to protect Thomas Hall (*id.*).

criminal liability for providing false statements (or if the Government chose to accredit their earlier statements, for perjury at trial) (JA 153; CR 41, at 6).

The Solicitor General's misapplication of *Morrison* to the facts of this case is accompanied by a standard of prejudice that has no place in remedying a right to counsel violation (discussed more fully *infra*, at 46-50). Thus, the Solicitor General criticizes the court of appeals for relying on respondents' pretrial proof of prejudice and for failing to conduct "a post-trial, case-specific analysis" of the record made at trial "to determine whether [respondents] suffered actual and specific prejudice" (Pet. Brief 18). But when prejudice stems from the unavailability of witnesses because of counsel's belated appointment and the faded recollections of those that are ultimately found, of what utility is a searching review of the trial record? The testimony of those witnesses who appeared at trial reveals nothing of the import of those who did not. And the recollections of those called to testify sheds no light on what has been forgotten.

The futility of searching for prejudice in a trial record has frequently been the subject of comment. As Mr. Justice Brennan wrote of the inherent difficulties in establishing a record of the prejudice that results from a violation of the Speedy Trial Clause:

"Although prejudice seems to be an essential element of speedy-trial violations, it does not follow that prejudice — or its absence, if the burden of proof is on the government — can be satisfactorily shown in most cases. . . . Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses." *Dickey v. Florida*, 398 U.S. 30, 53-54 (1970) (concurring opinion).⁴⁷

⁴⁷ See also *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978) (prejudice resulting from defense counsel's conflict of interest will not appear on the record); *Barker v. Wingo*, 407 U.S. 514, 532 (1972) ("If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if

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In any event, it is simply not true that the court of appeals made no review of the trial record in reaching the conclusion that respondents had been prejudiced by the denial of counsel. Indeed, its opinion reflects just the contrary.⁴⁸ And the trial record substantiates rather than undercuts respondents' pretrial evidence of prejudice. Although the record obviously does not reveal what missing witnesses would have said or what forgetful witnesses would have recalled, it vividly illustrates in a number of respects the handicaps caused by the delay in appointing counsel for these accuseds, who all the while were prevented from probing for evidence themselves.

Key to the prosecution's inconsistent and often incredible case against respondents was the Government's purported evidence of a motive. The prosecution offered a tenuous but colorable theory: that respondent Mills murdered Thomas Hall to avenge Mills' placement in protective detention during the summer of 1979 on account of erroneous information

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defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.") A number of lower federal courts have also acknowledged the near impossibility of adducing from the trial record concrete evidence of the prejudice that results when an accused is rendered unable to initiate a prompt investigation. See, e.g., *Ross v. United States*, 349 F.2d 210, 215 (D.C. Cir. 1965); *United States v. Wahrer*, 319 F.Supp. 585, 588 (D. Alaska 1970) ("The specific showing of prejudice can be a difficult task. In what manner can a defendant show that he would have been able to find a particular witness, or piece together a certain bit of evidence if the government had carried through the indictment and arrest judiciously.") See also *United States v. Mays*, 549 F.2d 670, 682 (9th Cir. 1977) (Ely, J., dissenting) ("The obvious question, as the majority recognizes, is in what manner can a defendant show that particular witnesses, no longer available or laboring under stale memories, could enhance his defense if the government had proceeded through the indictment judiciously? . . . The obvious answer, in the overwhelming number of cases is, I should think, that the burden of summoning affidavits from buried bodies or dimmed minds will be insurmountable.") Cf. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 870 (1982) (defendant's inability to interview missing witnesses "may well support a relaxation of the specificity required" in establishing a violation of Compulsory and Due Process Clauses).

⁴⁸ "The record convinces us that preindictment isolation without the assistance of counsel unconstitutionally obstructed the ability of [respondents] to defend themselves at trial" (Pet. App. 23a) (emphasis added).

knowingly supplied to prison officials by Hall.⁴⁹ However, prior to trial the prosecution was compelled to produce to respondents documents suggesting that someone other than Mills or Pierce had long before embarked on a campaign to rid the prison of Mr. Hall. In April, 1979, well before Mills' placement in protective confinement (Tr. 342, 362) and even prior to Pierce's arrival at Lompoc (Tr. 1392), Hall's cell in K Unit was firebombed. Several days later, he was placed in protective detention (apparently with his acquiescence (Ex. 104; Tr. 1102-03)) on the basis of information confidentially revealed to prison authorities by three inmates "that his life was in danger, and he would possibly be killed" (Tr. 1091, 1093). Writing to his parents from ADU shortly thereafter, Hall penned a farewell letter to his family and asked that it be read "at my funeral" (Ex. 105B; Tr. 1104-05).

As they predicted would be the case prior to trial (JA 154-55), respondents' counsel were wholly foreclosed from exploiting this powerful exculpatory evidence because of their inability some fourteen months after the fact to locate witnesses capable of providing competent testimony. Left to their own devices, respondents were unable to trace the whereabouts of the three inmates who told prison authorities in April 1979 (four months before the murder) that Hall's life was in danger. Further, although numerous inmates who were interviewed during the summer of 1980 professed to having had knowledge of the events surrounding the earlier attempt on Hall's life, none was sufficiently certain of those events fourteen months later to testify under oath (*id.*). As a result, respondents were relegated at trial to establishing the sterile facts of the April 1979 events, but failed entirely

⁴⁹ The evidence supporting the prosecution's theory consisted of a statement purportedly made by Mills to inmate Wagner when both were being held in protective detention. Wagner recalled that "[Mills] had an idea why he was there, and that he was going to take care of it when he got out" (Tr. 344). This statement was coupled with the testimony of a prison counselor that Hall had provided the information which had resulted in Mills' protective confinement (Tr. 474). Curiously, inmate Wagner acknowledged that Mills never identified Hall as the person he believed was responsible for his detention (Tr. 344), and the counsellor conceded that prior to Hall's death, he had not told "a single solitary living soul" that Hall was the source of the information that led prison authorities to isolate Mills (Tr. 477).

in offering the jury a clue as to why Hall feared for his life, why a prior attempt to kill him had been made and, most importantly, who was responsible.

The trial record also provides evidence of another kind of prejudice. Pretrial submissions established that during the nearly one-year investigatory head-start arrogated by the prosecution when respondents could conduct no investigation of their own, more than fifteen percent of the prison population had been interrogated by federal agents.⁵⁰ Not suspecting that respondents would solicit their testimony, and seeking to avoid any involvement, many of these inmates concocted stories to distance themselves from the events in question. As a result, respondents' counsel were prevented from even adducing the testimony of those inmates who feared prosecution for false swearing or perjury, and the Government assured itself a veritable field day in impeaching defense witnesses. Indeed, of the three defense witnesses who described the Hall murder, all three were impeached with prior statements placing them well outside E Unit at the time of the crime (Tr. 1023-24, 1038-40, 1055-56); and of the three witnesses who testified that neither Mills nor Pierce entered or departed the E Unit on the evening of the murder, each confessed to having lied to prosecution investigators when shortly after the murder they said they were elsewhere that night (Tr. 692, 696, 720-22, 741-42).⁵¹

Our point is not that an examination of the trial record alone will reveal conclusively that respondents were denied

⁵⁰ On the evening of the Hall murder, 904 inmates were residing in general population at the Lompoc Penitentiary (Ex. 34; Tr. 610-11). Within the first six months after the murder, FBI agents interrogated in excess of 146 of them (JA 143-46).

⁵¹ The prosecution took pains to preserve this tactical advantage. Purporting to invoke the Jencks Act as a shield, it refused to produce any statements taken from inmates it did not intend to call as trial witnesses. See Government's Opposition To Defendant's Motion For Discovery 4-6 (CR 44). And when the district court ordered some of these statements produced pursuant to Fed. R. Crim. P. 16, the Government successfully petitioned a panel of the Ninth Circuit for a writ of mandate, which held — erroneously we submit — that the Jencks Act prohibits discovery of statements of individuals the Government does not intend to call, regardless of their materiality under Rule 16. See Pet. App. 38a-40a. Respondents' petition for review of that ruling was denied. *Mills v. United States*, 454 U.S. 902 (1981).

a fair trial. Rather, the record is indicative of obstacles and handicaps that an experienced trial judge, fully conversant with the evidence in the case and the realities of prison life,⁵² believed an accused should not have to confront and suffer under. In his view, and that of the court of appeals, prejudice inheres in a situation in which for eight critical months the prosecution is able to conduct full-scale trial preparation while the defense cannot even start. The trial record only serves to confirm that view.

The courts below are not alone in concluding that the denial of a meaningful opportunity to investigate is necessarily prejudicial to a defendant in such circumstances. For example, in *United States v. Morrison*, 518 F.Supp. 917 (S.D.N.Y. 1981), a strikingly similar case involving an assault committed in prison, the defendant's investigation was hindered by the Government's failure to preserve a list of inmates who were confined in the unit in which the crime took place. In response to a motion to dismiss, the Government managed to locate two undated rosters which, together with a related list secured by the defense, provided the names of some twenty-four inmates who were in the unit on the date in question. Although the defendant could point to no specific witness or item of testimony that had been irretrievably lost, the district court ruled that the defendant had "been deprived of the opportunity to interview witnesses who very possibly have exculpatory testimony to offer", and thus could not reasonably be assured a fair trial (*id.* at 918-19):

"Despite these efforts [of the Government to identify all of inmates who were confined in the unit in which the assault took place], however, there remains a strong possibility that there were other inmates who witnessed the assault but who are not named on the lists now available. The defense counsel represents that one such witness has been found whose testimony may prove beneficial to the defense.

⁵² See *Rutherford v. Pitchess*, 457 F.Supp. 104 (C.D. Cal. 1978) (Gray, J.) (conditions of post-conviction confinement in county jail); *Stewart v. Gates*, 450 F.Supp. 583 (C.D. Cal. 1978) (Gray, J.), *remanded*, 618 F.2d 117 (9th Cir. 1980) (policies respecting inmates' communications with the outside world); *Dillard v. Pitchess*, 399 F.Supp. 1225 (C.D. Cal. 1975) (Gray, J.) (treatment of pretrial detainees).

Undoubtedly there are other witnesses who would provide exculpatory testimony but whose whereabouts will never be known from available information.”⁵³

This Court counselled in *Morrison* for judicial responsiveness “to proved claims that governmental conduct has rendered counsel’s assistance to the defendant ineffective” (449 U.S. at 364). The Court noted that judicial intervention is appropriate when “the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel’s representation” (*id.* at 365) (emphasis added). And it approved dismissal of an indictment, admittedly an extreme remedy, where the Sixth Amendment violation results in a “substantial threat” of “demonstrable prejudice” (*id.*) (emphasis added). On the facts of this case, and after a thorough consideration of *Morrison*, the court of appeals justifiably concluded that at a minimum such a threat was present here. In the absence of any lesser remedy for the denial of assistance of counsel, at the only time it would have been of use to respondents in preparing and preserving a defense, it properly dismissed the indictments.⁵⁴

B. This Court Should Not Discard the *Morrison* Standard for a Test Requiring Proof of Actual Prejudice

Although not expressly proposing it, the Solicitor General implicitly asks this Court to discard the “substantial threat of prejudice” standard it so recently reaffirmed in *Morrison* in favor of the “actual prejudice” test used to evaluate under the Fifth Amendment claims of undue preaccusation delay. Thus, he maintains that the absence of counsel at a critical stage should not be sufficient to upset a conviction unless the defendant establishes that he “has suffered actual and specific prejudice as a result of the failure to appoint counsel” and the prejudice is so “serious . . . that he can be said to have been

⁵³ Noting that “[a]n accused has a fundamental right to present his own witnesses to establish a defense,” the district court dismissed the indictment “because the clear prejudice to defendant here requires it” (518 F.Supp. at 919). *Accord, Chism v. Koehler*, 527 F.2d 612 (6th Cir.), *cert. denied*, 425 U.S. 944 (1976); *United States v. Dolack*, 484 F.2d 528 (10th Cir. 1973).

⁵⁴ The Solicitor General’s proffer of alternative remedies — “cross-examination, argument to the jury, and [jury] instructions” (Pet. Brief 50 n.40) — misses the point. Under our system, it is the responsibility of the court and not of the fact-finder to remedy constitutional violations.

denied a fair trial" (Pet. Brief 18, 50). As he applies it to the facts of this case, the Solicitor General seems to advocate a standard requiring concrete proof that but for the right to counsel violation, in all likelihood the defendant would have won an acquittal.

The standard proposed by the Solicitor General runs contrary to over forty years of Sixth Amendment jurisprudence. As early as *Glasser v. United States*, 315 U.S. 60, 76 (1942), the Court stated: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial." Since *Glasser*, the Court has repeatedly overturned convictions without requiring the showing of the specific prejudice which the Solicitor General would have the Court now demand where counsel was not provided at some critical stage or where he was prevented from discharging his normal functions. See, e.g., *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961).⁵⁵

We do not mean to suggest that the predicate for overturning convictions in these cases was not prejudice to the accused. However, "[t]here is a difference between a requirement that a defendant suffer some prejudice and a requirement that he show some specific prejudice." *Morris v. Slappy*, 103 S. Ct. 1610, 1624 n.9 (1983) (Brennan, J., concurring). Just as the lawyers' conflict of interest in *Holloway* and *Glasser* "itself demonstrated a denial of the 'right to have the effective assistance of counsel,'" *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980), respondents' denial of assistance at a

⁵⁵ Indeed, in *Coleman v. Alabama*, 399 U.S. 1 (1970), the Court vacated a conviction and remanded for a determination of whether denial of counsel at a preliminary hearing could be deemed harmless over Mr. Justice Harlan's vigorous dissenting view that reversal should require a showing that defendants were "prejudiced in their defense at trial, in that favorable testimony that might otherwise have been preserved was irretrievably lost" (*id.* at 20). And in *Holloway*, where petitioner had been denied effective assistance by virtue of her attorney's conflicting interests in representing multiple defendants, the Court expressly declined to impose an "actual prejudice" standard, noting that inquiry under that test "would require . . . unguided speculation" (435 U.S. at 491).

stage critical to the preparation of their defense alone demonstrates prejudice to their case. Accordingly, the lower federal courts have never required proof of actual, specific prejudice when the Sixth Amendment violation stems from a failure to appoint counsel under circumstances that prevent the attorney from discharging his or her obligation to make a thorough investigation of the facts. See, e.g., *Chism v. Koehler*, 527 F.2d 612 (6th Cir.), cert. denied, 425 U.S. 944 (1976); *United States v. Dolack*, 484 F.2d 528 (10th Cir. 1973).⁵⁶

There are many sound reasons for rejecting the "actual prejudice" test developed under the Fifth Amendment as a tool for safeguarding the right to counsel under the Sixth. First, unlike the target of a delayed indictment, who is free to conduct his own investigation and capable of building evidence to show the adverse effects of delay to his defense, the accused who is detained without counsel for a prolonged period pending indictment can do neither. Secondly, when the complaint is merely preaccusation delay, the most the Government typically can be charged with is neglect, a far lesser offense than the Government's breach of a constitutional obligation to provide the accused with the assistance of counsel.

Thirdly, the "Due Process Clause has a limited role to play" in combatting oppressive delay, *United States v. Lovasco*, 431 U.S. 783, 789 (1977), because the paramount protection is afforded by statutes of limitations. See *United States v. Marion*, 404 U.S. 307, 322 (1971). In contrast, the right to counsel is of critical importance in protecting the rights of an accused. As former Chief Justice Walter V. Schaefer ex-

⁵⁶ Moreover, requiring proof of actual prejudice under the circumstances of this case would create the ironic result of favoring defendants who have received the prompt appointment of incompetent counsel over defendants who have languished in jail or prison for months or years totally without the advice of or investigation by counsel. Where the accused has been denied effective assistance by virtue of his lawyer's neglect and through no fault of the state, he must show some measure of prejudice, but none of the circuits has imposed an "actual prejudice" test as demanding and ungiving as what the Solicitor General proposes here for the more egregious failure to provide an attorney altogether. See, e.g., *Washington v. Strickland*, 693 F.2d 1243, 1262 (5th Cir. 1982) (en banc), cert. granted, 103 S. Ct. 2451 (No. 82-1554, 1983) ("actual and substantial disadvantage to the course of his defense"); *United States v. Wood*, 628 F.2d 554, 559 (D.C. Cir. 1980) (en banc) ("likely to have resulted in prejudice to appellant's case").

plained, "Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956).

Next, the "actual prejudice" standard would impose an impossible burden on a defendant who has been deprived of counsel's assistance in the early investigation and preparation of the case, particularly where the defendant has been locked away and unable to take steps to assemble a defense himself. As noted earlier, when an accused has been denied an opportunity to probe for evidence, proof of actual, specific and nonspeculative prejudice is elusive, and only rarely can such prejudice be demonstrated.⁵⁷ What a lawyer could have discovered typically is as unknowable and as subject to "unguided speculation" as what the lawyers operating under conflicts of interest in *Holloway* and *Glasser* would have done differently had they not suffered from divided loyalties.

Finally, inasmuch as due process protection against unwarranted delay is aimed chiefly at redressing "prejudice to the defense," *United States v. Marion*, 404 U.S. at 324-25, it is appropriate in Fifth Amendment cases to focus on whether the impact of delay might have affected the outcome of the case. However, the Court's opinion in *Morrison* reaffirms that the rationale of the Sixth Amendment right to counsel is much broader: "This right, fundamental to our system of justice, is meant to assure fairness in the adversary criminal process" (449 U.S. at 364). Necessarily, the test under the Sixth Amendment must be different than that under the Fifth; it must focus not on whether the right to counsel violation

⁵⁷ Indeed, our research has disclosed only three federal cases since this Court's decision in *Marion* in which a defendant urging preaccusation delay has carried his burden: *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976); *United States v. Morrison*, 518 F.Supp. 917 (S.D.N.Y. 1981); and *United States v. Wilson*, 357 F.Supp. 619 (E.D. Pa.), appeal dismissed, 492 F.2d 1345 (3d Cir. 1973), rev'd on other grounds, 420 U.S. 332 (1975), *aff'd mem.*, 517 F.2d 1400 (3d Cir. 1976) (affirming the dismissal). The courts of appeals have frequently commented on the extraordinary and almost impossible burden of proving prejudice under the Fifth Amendment standard. See, e.g., *United States v. Solomon*, 686 F.2d 863, 871-72 (11th Cir. 1982); *United States v. Jackson*, 504 F.2d 337, 339 (8th Cir. 1974), cert. denied, 420 U.S. 964 (1975). See also *United States v. Lovasco*, 431 U.S. 783, 796-97 (1977).

affected the *outcome* of the criminal proceeding but on whether it impaired the *fairness* of that proceeding. The *Morrison* "substantial threat" standard is uniquely suited for gauging the kind of prejudice that results from a right to counsel violation, and should not be discarded for one that is not.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

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February, 1984

No. 83-128

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM GOUVEIA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT ROBERT RAMIREZ

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QUESTIONS PRESENTED

1. Whether, under any circumstances, a federal prisoner, suspected of committing a crime while in prison and placed in administrative detention, is constitutionally entitled to an attorney prior to indictment?

2. Whether dismissal of the indictment is the appropriate remedy where an indigent federal prisoner is held in solitary confinement for 19 months as a suspect in a murder investigation and his requests for appointed counsel are denied until he is formally indicted 20 months after the alleged crime?

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BRIEF OF RESPONDENT ROBERT RAMIREZ**OPINION BELOW**

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 704 F.2d 1116 (9th Cir. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1983. The petition for writ of certiorari was filed by the Government on July 25, 1983 and was granted on October 17, 1983. The jurisdiction of the Court rests on 28 U.S.C., section 1254(1).

CONSTITUTIONAL PROVISION

The Sixth Amendment provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

STATEMENT

On November 11, 1978, Thomas Trejo, an inmate at the Federal Correctional Institute at Lompoc, California, was stabbed to death. Mr. Trejo received 43 stab wounds to the heart. There were no eyewitnesses to the crime. (2 R. 147-150) The autopsy surgeon placed the time of death between noon and 1:00 p.m. (2 R. 160) The body was discovered at 3:20 p.m. by Armando Macias, an inmate who was assigned to the cell in M-Unit where the killing occurred. (5 R. 818-831) Also, at approximately 3:20 p.m., a correctional officer discovered four knives wrapped in blood-stained toilet paper, lying on the floor of the second floor latrine in E-Unit. (6 R. 1191-1193)

Within hours of the killing, both Bureau of Prisons and the Federal Bureau of Investigation began their in-

vestigations to discover the perpetrators of the crime. (J.A. 50) Beginning on November 11, 1978, the F.B.I. interviewed over 100 witnesses. Many of these witnesses were interviewed more than once. (J.A. 50)

The Respondents in this case, Adolpho Reynoso, Robert Ramirez, William Gouveia and Philip Segura, and two additional co-defendants, Pedro Flores and Steven Kinard, were all sentenced federal prisoners. On the day of Thomas Trejo's death, they were all serving their sentences at the Federal Correctional Institution at Lompoc, California.

On the evening of November 11, 1978, three of the defendants who were later indicted in this case, Adolpho Reynoso, Pedro Flores and William Gouveia, were placed in solitary confinement in the Administrative Detention Unit (ADU). This decision was made by Federal Correctional Institution officials, who suspected that the murderers of Thomas Trejo were members of the "Mexican Mafia." All persons suspected of being members of this prison gang were immediately placed in the Administrative Detention Unit. This included Reynoso, Flores and Gouveia. (J.A. 50)

On November 22, 1978, Reynoso, Flores and Gouveia were released from the Administrative Detention Unit and returned to the general prison population. On December 4, 1978, the prison officials placed Adolpho Reynoso, Pedro Flores, William Gouveia, Robert Ramirez, Philip Segura and Steven Kinard into the Administrative Detention Unit. (J.A. 50)

As early as November 29, 1978, as a result of an interview with a prison inmate, the F.B.I. had identified Reynoso, Ramirez, Flores, Gouveia, Segura and Kinard as the possible murderers of Thomas Trejo. On Novem-

ber 29, 1978, the United States Attorney's Office in Los Angeles, California, opened a file with the aim of eventually prosecuting those six individuals for the murder of Thomas Trejo. This occurred at the request of F.B.I. agent James R. Wilkins, the agent in charge of the investigation of the Trejo murder. (J.A. 50-51)

However, these six individuals, including the Respondent Robert Ramirez, were not indicted for the murder of Thomas Trejo until June 17, 1980. The first time that the defendants were brought into court for an arraignment was on July 14, 1980. In the case of Robert Ramirez, he remained in solitary confinement in the Administrative Detention Unit as a suspect in the murder of Thomas Trejo for twenty months before being brought to court to face criminal charges alleging that he was one of the murderers of Thomas Trejo.

During the F.B.I.'s investigation of the case, Robert Ramirez was interrogated by the F.B.I. on three occasions. He was questioned twice in November of 1978 and once on December 4, 1978. On the December 4, 1978 occasion, Robert Ramirez requested that an attorney be provided to assist him. At that time, no attorney was provided. (J.A. 32, 37)

The Bureau of Prisons instituted an administrative investigation and on December 13, 1978, the Unit Disciplinary Committee and the Institutional Disciplinary Committee at the Federal Correctional Institution at Lompoc conducted administrative hearings to consider Robert Ramirez' involvement in the killing. At the hearings, Robert Ramirez again requested that an attorney be provided for him. This request was repeatedly denied. The prison officials found at these administrative hearings that Robert Ramirez was guilty of murdering Thomas Trejo and Mr. Ramirez was placed in solitary confine-

ment in the Administrative Detention Unit.¹ His confinement in the Administrative Detention Unit continued until after his indictment for murder in the United States District Court.

Robert Ramirez remained in the Administrative Detention Unit at the Federal Correctional Institution at Lompoc continuously for a period of more than 19 months. While in the Administrative Detention Unit, Robert Ramirez was confined to his individual cell except for a 30 minute exercise and shower period every day. He was denied access to the general population and his participation in various prison programs was curtailed. He had access to legal materials, he had visitation rights, and he had some access to a telephone on a very limited basis. During this period, no attorney was appointed to represent Mr. Ramirez and since he was indigent, he was unable to hire his own attorney. (Pet. App. 2a-3a)

On June 17, 1980, a grand jury indictment was filed against Adolpho Reynoso, Robert Ramirez, William Gouveia, Pedro Flores, Philip Segura and Steven Kinard. All six individuals were accused of the crimes of conspiracy to commit murder in violation of 18 U.S.C., section 1117, and the murder of Thomas Trejo at the Federal

¹ The United States Department of Justice Bureau of Prisons Incident Report dated December 13, 1978, which was prepared at the time of the prison administrative hearing which inquired into the involvement of Robert Ramirez in the killing of Thomas Trejo reads:

Based on confidential information and inmate interviews, you did on 11 Nov 78, participate in the fatal stabbing of inmate TREJO, THOMAS A., Reg. No. 35025-136. This murder took place in M Unit at approximately 12:30 p.m., you were assisted by not less than six other inmates, of which two others along with you did also stab the victim. (Ramirez Excerpt of Record in Court of Appeals p. 26)

Correctional Institution at Lompoc, California in violation of 18 U.S.C., section 1111. (J.A. 4)

On July 14, 1980, over 21 months since the death of Thomas Trejo, Robert Ramirez was brought to court for the first time to answer the charge of murdering Thomas Trejo. On that date, counsel was appointed to represent Mr. Ramirez and a plea of not guilty was entered.²

Prior to trial, Robert Ramirez and all of the co-defendants moved for a dismissal of the indictment for violations of their right to due process under the Fifth Amendment and for violations of their right to a speedy trial and to the assistance of counsel under the Sixth Amendment. Because of the delay on the part of the Government in bringing the indictment, almost two years had elapsed before the case would be brought to trial. Because of the long delay in bringing formal charges against Robert Ramirez and the other defendants and the delay in providing them with counsel, the attorneys ultimately appointed to represent them were forced to

² On September 20, 1979, Robert Ramirez was called as a witness before the grand jury investigating the murder of Thomas Trejo. Counsel was appointed prior to his testimony on that date for the limited purpose of advising Mr. Ramirez of his rights as they related to his testimony before the grand jury. When he appeared before the grand jury, Robert Ramirez agreed to furnish fingerprint exemplars, but declined to make any statement concerning the death of Thomas Trejo. (Ramirez' Excerpt of Record in Court of Appeals. p. 28-29)

Obviously, counsel must have advised Mr. Ramirez that the Fifth Amendment allowed him to refuse to make a statement before the grand jury but that a request to provide fingerprint exemplars could not be refused on Fifth Amendment grounds because fingerprint exemplars are non-testimonial evidence. See, *Schmerber v. California*, 384 U.S. 757 (1966); *United States v. Wade*, 388 U.S. 218 (1967); *United States v. Dionisio*, 410 U.S. 1 (1973).

conduct an investigation into the case almost two years after the death had occurred. (J.A. 78-93)

In support of the motion, Robert Ramirez alleged that witnesses were difficult to locate and memories of the events of November 11, 1978 had begun to fade. Several witnesses listed in Ramirez' "notice of alibi" did not appear and testify at trial because they could not be located. In essence, while the Government was able to begin their investigation on the very day of the murder and continue that investigation for two years, Robert Ramirez and the other defendants were deprived of the opportunity to conduct a fresh investigation while the memories of witnesses were still clear, and while those witnesses could still be found. (J.A. 32-34, 78-93)

Noting that it was "unfortunate that there has been the delay that has ensued in this prosecution," the trial judge denied the motion to dismiss the indictment. On the right to counsel ground, the trial judge stated that "the right to counsel did not adhere or did not arise, and did not arise until the appropriate time after the indictment." (J.A. 92-93)

The first trial commenced on September 16, 1980. The jury was unable to reach a verdict in the case of the four Respondents Reynoso, Ramirez, Segura and Gouveia, and a mistrial was declared. However, Pedro Flores was acquitted by the jury in the first trial. Steven Kinard, also charged in the indictment, entered into a plea bargain prior to the first trial and became a Government witness against the remaining defendants.³

³ Steven Kinard was the only Government witness to directly involve Robert Ramirez in the conspiracy and murder of Thomas Trejo. Although Steven Kinard was originally charged with conspiracy to murder Thomas Trejo, the murder of Thomas Trejo, and

A second trial began on February 17, 1981. At the conclusion of this trial, all four Respondents were convicted of both conspiracy and murder. Each was sentenced to consecutive life and ninety-nine year terms of imprisonment.

The primary Government witness against Robert Ramirez at the trial was Steven Kinard. There was no physical evidence connecting Mr. Ramirez to the commission of the crime.⁴ Steven Kinard testified that shortly after the arrival of Thomas Trejo at the Lompoc prison in November of 1978, he had a conversation in the yard with Adolpho Reynoso and Philip Segura. At that time, Adolpho Reynoso stated that Trejo had made a bad move against "la cliqua" and he had to be "sent home by Christmas." Kinard understood this to mean that Trejo was to be murdered. (3 R. 484-489)

Kinard testified that during this same first week in November of 1978, he had a conversation with Robert Ramirez. According to Kinard, Ramirez stated that he

conveying a knife in prison, Kinard entered into a plea agreement with the Government. Pursuant to the agreement, Kinard pleaded guilty to conveying a weapon in a federal correctional institution and testified at the trial as a Government witness. In exchange, the Government agreed to dismiss the murder and conspiracy charges. (4 R. 477-478, 508) What actually occurred, however, was that after all of the Respondents were convicted, Kinard was permitted to withdraw his guilty plea and all charges were dropped. (14 R. 3093)

⁴ A piece of writing paper was found on top of the locker in the cell where the body was found. The paper contained one latent fingerprint and two latent palmprints. The fingerprint was that of William Gouveia. One of the palmprints belonged to William Gouveia and the other palmprint belonged to Philip Segura. (3 R. 440-445) A bloody shoeprint found on a locker door in the cell corresponded in size and design with the shoe of Philip Segura. (3 R. 404-415, 397-399)

had procured knives from a black inmate in the welding shop in exchange for marijuana. On the following day, Kinard observed Robert Ramirez receive the knives from an inmate in the welding shop. Ramirez then told Kinard that he would give the knives to an inmate, named Gano, to smuggle into the main institution building. That same day, Robert Ramirez handed two knives to Gano⁵ through the shop window. (3 R. 490-494)

According to Kinard, two days later, Robert Ramirez told Steven Kinard to pick up a knife from inmate Stinky Manuri.⁶ Kinard met Manuri at the recreation yard where Manuri handed Kinard a knife. Kinard put the knife in his pocket and carried it into the institution building. Kinard gave the knife to Robert Ramirez who, in turn, hid the knife in the trash, stating that another inmate would pick it up. (3 R. 494-501)

On November 11, 1978, Steven Kinard went to the recreation yard after brunch at about 11:00 a.m. Kinard testified that he joined a group of inmates including Reynoso, Ramirez, Segura, Gouveia, Palacios and Recendez. At that time, Adolpho Reynoso stated that "the fool had to be sent home today." The group then walked the track and when it started to rain, they entered the gym. Inside of the gym corridor, Reynoso and Ramirez discussed where Trejo should be killed. After considering several locations, Reynoso finally decided that it should occur in M Unit. (3 R. 509-515)

⁵ James Gano testified that he was at Lompoc in November of 1978. He denied ever receiving knives from Robert Ramirez. (9 R. 1793-1797)

⁶ Peter Manuri, also known as "Stinky," testified that he was an inmate at Lompoc in November of 1978. Mr. Manuri denied ever giving Steven Kinard a knife while at Lompoc. (11 R. 2419-2426)

Steven Kinard testified that Reynoso told Robert Ramirez to bring Thomas Trejo to M Unit since Ramirez had been a friend of Trejo's in the past. The group then broke up with some members leaving to change clothes and others leaving to obtain the knives. (3 R. 515-521)

The entire group once again reassembled in the gym. It was there that Reynoso directed Ramirez to find Trejo. (3 R.T. 322) Kinard testified that Reynoso directed Kinard to go to his cell and wait. As Kinard was leaving, he saw Reynoso, Segura, Gouveia, Palacios and Recendez walking toward M Unit. Steven Kinard then went to his cell in K Unit. (4 R. 531-534)

After fifteen or twenty minutes, William Gouveia called Steven Kinard and told him to meet with Tony Palacios⁷ and get the knives. Kinard testified that he met Tony Palacios in front of K Unit and exchanged jackets with him. The knives were inside of Tony Palacios' jacket. Kinard took the knives to his cell, cleaned them and wrapped them in tissue paper. William Gouveia and Willard Taylor⁸ entered Kinard's cell. Kinard gave the knives to Willard Taylor. After discussing where the knives could be disposed of, it was decided that Taylor would leave them in E Unit. (4 R. 532-545)

⁷ Antonio Palacios was an inmate at Lompoc in November of 1978. Mr. Palacios testified that he never met Steven Kinard at Lompoc. He also denied ever exchanging jackets with anyone between noon and 1:00 p.m. on November 11, 1978 in front of K Unit. (8 R. 1623-1631)

⁸ Willard Taylor, known as "B.T.," testified that on November 11, 1978, Steven Kinard called Taylor into his cell and asked Taylor to help him get rid of some bloody knives. Gouveia, who was also present in Kinard's cell, likewise asked Taylor to help them get rid of the knives. (5 R. 870-880)

Steven Kinard testified that he thereafter went to the gym where he met Reynoso, Ramirez, Segura, Palacios, Recendez and Gouveia. According to Kinard's testimony, Kinard asked Adolpho Reynoso if it had gone well. Reynoso replied that "the fool's gone" and that he was "home by Christmas." Reynoso also stated that when he got "him" in a choke hold, that was when the brothers started working on "him." Reynoso then suggested that everyone go to a movie and the group left the gym. (4 R. 545-561)⁹

In the defense case, the Respondents Robert Ramirez (11 R. 2233-2247), Philip Segura (10 R. 2136-2159), and William Gouveia (11 R. 2362-2381) all denied participating in the murder and conspiracy. Each testified and presented evidence that they were elsewhere at the time of the murder. Robert Ramirez testified that he was in the gymnasium at the time of the killing. In addition to his own testimony, three inmates also testified that they observed Mr. Ramirez in the gymnasium between noon and 1:00 p.m. on the day of the killing. (7 R. 1323-1335,

⁹ The Government also offered testimony from other inmate witnesses. Edward Chaparro testified that Reynoso stated that he would kill again if the only thing that would happen to him was the loss of good time sentence credits. (6 R. 1209-1222) Richard Villalobos testified that he observed Pedro Flores pass a knife to Robert Ramirez in the main corridor on the night before the killing. (2 R. 189-192) Gene Newby testified that he observed the four Respondents and Pedro Flores enter the unit across the hall from where the body was found shortly after brunch on November 11, 1978. Reynoso and Segura were then observed tearing some clothing and flushing it down the toilet. (6 R. 1007-1017)

In the defense case, Pedro Flores testified that he was an inmate at Lompoc in November of 1978. Mr. Flores denied passing a knife to either Robert Ramirez or Adolpho Reynoso on the evening of November 10, 1978. (7 R. 1414, 1437)

1356-1365; 9 R. 1937-1952). Two inmates testified that Steven Kinard had told them that he killed Thomas Trejo, while assisted by another inmate named Michael Thompson. (10 R. 2061-2066, 2209-2212)

After the four Respondents were convicted, they appealed their convictions to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals, in an en banc decision, voted six to five to reverse the convictions of all four Respondents. The Court also ordered the indictment to be dismissed.

The Ninth Circuit held that lengthy pre-indictment isolation without the assistance of counsel irrevocably prejudiced the ability of the Respondents to prepare an effective defense, and, thus, unconstitutionally deprived them of their Sixth Amendment right to counsel and to a fair trial. *United States v. Gouveia*, 704 F.2d 1116, 1119 (9th Cir. 1983). Since the Government's conduct in this case resulted in harm which was not capable of after-the-fact remedy, the Ninth Circuit ruled that the Respondents were in a position similar to suspects who were denied a speedy trial, and thus dismissal of the indictment was the only certain remedy. *United States v. Gouveia*, *supra*, at 1125-1127.

SUMMARY OF THE ARGUMENT

1. The Sixth Amendment right to counsel attached prior to the indictment of the Respondent because of the unique facts of this case. The Respondent was a federal prisoner. He was placed in solitary confinement for 20 months as a suspect in a prison murder prior to being indicted for that murder. Three weeks after being placed in solitary confinement, he was told at a prison disciplinary hearing that he was considered to be guilty of murdering another inmate. Since he was indigent, Respondent

requested that counsel be provided for him. No counsel was provided, however, until 20 months later when Respondent appeared in court to be arraigned on the murder charge.

The unfairness that resulted was that the Government, through the FBI, was able to begin their investigation and preparation of the case from the very day of the murder. Respondent, on the other hand, without counsel and placed in solitary confinement, was prevented from beginning his investigation and defense preparation until almost two years later when counsel was appointed. By then, inmate defense witnesses had been transferred, released and some were deceased. The net effect was that Respondent was unable to present the testimony of several defense witnesses who were now dead or missing, and those defense witnesses who were available had difficulty recalling the events which had occurred approximately two years before.

Although *Kirby v. Illinois*, 406 U.S. 682 (1972) limits the right to counsel to after the initiation of the adversary judicial proceeding, the *Kirby* case was factually different from Respondent's case. *Kirby* was not a prison case. This Court's decision in *United States v. Wade*, 388 U.S. 218 (1967) held that the right to counsel guarantee applies to critical stages of the proceedings, or, in other words, when counsel's presence is necessary to preserve the defendant's right to meaningfully cross-examine the witnesses against him and to have the effective assistance of counsel at the trial itself. See also, *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Powell v. Alabama*, 287 U.S. 45 (1932). In Respondent's case, the right to counsel did attach prior to indictment in light of this Court's *Wade* decision.

2. The dismissal of a criminal indictment is an appropriate remedy for a violation of an accused's right to counsel upon a showing of "demonstrable prejudice, or substantial threat thereof." *United States v. Morrison*, 449 U.S. 361, 365 (1981). In this case, the Respondent has made a showing of demonstrable prejudice warranting the dismissal remedy.

The Ninth Circuit also found that there was a presumption of prejudice in this case from the Government's interference with the Respondent's right to the effective assistance of counsel, because there was a substantial threat of prejudice inherent in the facts of this case. Such a conclusion was consistent with numerous cases decided by this Court in which the particular right to counsel violation was deemed to be prejudicial per se. This has occurred in the past when no counsel has been provided, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Hamilton v. Alabama*, 368 U.S. 55 (1961), or when counsel is prevented from discharging functions vital to effective representation of his client. *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975).

ARGUMENT

I

A Federal Prisoner, Suspected Of Committing A Crime While In Prison And Placed In Administrative Detention, Has A Sixth Amendment Right To Counsel

The Sixth Amendment provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The right to counsel clearly applies to the representation in court by an attorney of a person accused of a felony. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938). In *Powell v. Alabama*, 287 U.S. 45

(1932), this Court stated that the right to counsel at trial was one of those certain "immutable principles of justice which inheres in the very idea of a free government," and that it is one of the "fundamental principles of liberty and justice." (287 U.S., 67-69)

In numerous decisions of this Court, it has been made clear that in a felony criminal case, the right to counsel is not limited to the trial alone. A defendant is entitled to the right to counsel at the arraignment. *White v. Maryland*, 373 U.S. 59 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961). He is entitled to have counsel assist in the preparation of the defense during that period of time between the arraignment and the trial. *Powell v. Alabama*, 287 U.S. 45 (1932). The right to counsel also exists at the preliminary hearing (*Coleman v. Alabama*, 399 U.S. 1 (1970)), and at a post-indictment lineup. *United States v. Wade*, 388 U.S. 218 (1967).

In the present case, the Ninth Circuit held that the right to counsel attached when a federal prisoner is held in isolation in administrative detention for more than ninety days pending investigation and trial for the commission of a crime while in prison. The Government argues that the opinion of the Ninth Circuit is in conflict with *Kirby v. Illinois*, 406 U.S. 682 (1972). This Court stated in *Kirby* in a plurality opinion, that the Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated" against an accused. *Kirby v. Illinois, supra*, at 688. Thus, in *Kirby*, this Court held that the right to counsel does not attach to out-of-court eyewitness identification procedures conducted prior to indictment. The Ninth Circuit correctly noted that *Kirby* is dis-

tinguishable from this case because *Kirby* was not a prison case.¹⁰

The Respondent's right to counsel issue does not arise in the context of a pre-indictment lineup. Indeed, eyewitness identification has nothing to do with this case. The Respondent Ramirez and his three co-defendants were deprived of their right to counsel for twenty months while they were placed in solitary confinement as suspects in a prison murder.

This occurred while the Government conducted its investigation into the case with the help of the Federal

¹⁰ When *Kirby v. Illinois*, 406 U.S. 682 (1972) was decided by this Court, it was at odds with numerous lower court of appeal decisions that held that the right to counsel attached at pre-indictment lineups. See, *Wilson v. Gaffney*, 454 F. 2d 142, 144 (10th Cir. 1972); *United States v. Greene*, 429 F.2d 193, 196 (D.C. Cir. 1970); *United States v. Phillips*, 427 F.2d 1035, 1037 (9th Cir. 1970). The *Kirby* decision was thereafter subjected to criticism in the legal periodicals. See, Comment, *Kirby v. Illinois: A New Approach to the Right to Counsel*, 58 Iowa L.Rev. 404, 416 (1972) ("the result in *Kirby* was reached because of an unnecessary narrow reading of *Wade* and the Sixth Amendment."); Note, *The Lineup's Lament: Kirby v. Illinois*, 22 De Paul L.Rev. 660, 675 (1973) ("By drawing a line between post- and pre-indictment lineups, the Court exalts form over substance."); Note, *Right to Counsel at Lineups—A Pro Forma Right*, 7 Suffolk Univ. L.Rev. 587, 606 (1973) ("the reasons given by the *Wade* Court for the importance of counsel's presence at the lineup apply whether the confrontation occurs before or after indictment."); Pulaski, *Neil v. Biggers: The Supreme Court Dismantles The Wade Trilogy's Due Process Protection*, 26 Stan.L. Rev. 1097, 1102 (1974). Furthermore, several states have declined to follow *Kirby* and have extended the right to counsel to pre-indictment lineups on the basis of state constitutional grounds. See, *People v. Bustamante*, 30 Cal. 3d 88; 177 Cal.Rptr. 576; 634 P.2d 927 (1981); *Blue v. State*, 558 P. 2d 636, 641 (Alaska 1977); *People v. Jackson*, 391 Mich. 323; 217 N.W. 2d 22 (1974); *Commonwealth v. Richman*, 458 Pa. 167; 320 A. 2d 351 (1974).

Bureau of Investigation. Since Respondent was serving a federal prison sentence for bank robbery, within a month after the murder, the prison held a prison disciplinary hearing at which the Respondent was found guilty of the murder. His punishment was loss of good time sentence credits and placement in solitary confinement. At the hearing, however, the Respondent asked for the assistance of an attorney (J.A. 32-33). Since the Respondent was indigent, he was unable to privately retain an attorney and no attorney was provided for the Respondent until he was indicted twenty months later.

Providing an attorney for the first time at the post-indictment arraignment was not sufficient under the facts of this case to insure that Respondent was afforded his constitutional right to counsel. The Ninth Circuit, in reaching that conclusion, essentially relied upon the earlier decisions of this Court. See, *Powell v. Alabama*, 287 U.S. 45 (1932); *United States v. Wade*, 388 U.S. 218 (1967); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

From *Powell v. Alabama*, *supra*, it is clear that the right to assigned counsel "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." (287 U.S., at 71) Thus, in *Powell*, the defendants' convictions were reversed because counsel was appointed only one day before the trial in a capital case. The right to counsel was not protected if counsel was appointed at a time period where it was impossible to conduct pre-trial preparation in the case. In the same manner, by delaying the appointment of counsel in Respondent's case for twenty months, the appointment of counsel was made in a manner which precluded effective aid in preparation and trial of the case.

In *United States v. Ash*, 413 U.S. 300, 310 (1973), this Court noted that the "extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pre-trial events that might appropriately be considered to be parts of the trial itself." These pre-trial events where the right to counsel attached were called critical stages in the proceedings in *United States v. Wade*, 388 U.S. 218 (1967). Thus, in *Wade*, this Court stated:

When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshaled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. (388 U.S., at 224)

In *United States v. Wade*, *supra*, this Court extended the Sixth Amendment right to counsel to a pre-trial lineup, denominating that event as a critical stage of the proceeding. The Court noted that a pre-trial proceeding is a "critical stage" if "the presence of . . . counsel is necessary to preserve the defendant's . . . right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." (388 U.S., at 277)

In the *Wade* case, this Court focused upon two problems in extending the right to counsel: the danger that suggestion, intentional or unconscious, will influence the witness' identification; and the difficulty in reconstruct-

ing the manner and mode of lineup identification at trial, so that defense counsel would be unable to cross-examine the witness on that subject. These problems led the Court to conclude that "there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" (*Powell v. Alabama*, 287 U.S. 45, 57)." (388 U.S., at 236-237)¹¹

Thus, from the *Wade* case, it is clear that if Respondent's right to meaningful confrontation and to the effective assistance of counsel at trial was substantially jeopardized by a twenty month pre-indictment delay and placement in solitary confinement, then his right to counsel was violated. This is so whether the Court uses the phrase "the right to counsel attaches" during prolonged administrative detention or whether the Court states that such prolonged detention "impairs the accused's right to meaningful confrontation and his right to the effective assistance of counsel at trial."

Although the *Kirby* decision does appear to limit the right to counsel to the post-indictment stage, a different rule must be applied to cases involving prison crimes, such as occurred in this case. In *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436

¹¹ This was further explained in Justice Stewart's concurring opinion in *United States v. Ash*, 413 U.S. 300, 324 n.1 (1973), where it states:

I do not read *Wade* as requiring counsel because a lineup is a "trial-type" situation, nor do I understand that the Court required the presence of an attorney because of the advice or assistance he could give to his client at the lineup itself. Rather, I had thought the reasoning of *Wade* was that the right to counsel is essentially a protection for the defendant at trial, and that counsel is necessary at a lineup in order to ensure a meaningful confrontation and the effective assistance of counsel at trial.

(1966), this Court extended the right to counsel to the post-arrest interrogation of an accused by the police, even though such interrogation occurred prior to the indictment.

In *Escobedo v. Illinois*, *supra*, the defendant was convicted of murdering his brother-in-law. On the night of the murder he was arrested and interrogated at a police station. While at the police station he made several requests to see his lawyer, who, though present in the building, was refused access to his client. The defendant was not advised by the police of his right to remain silent and made damaging statements after repeated questioning by the police. The conviction was reversed by this Court on Sixth Amendment right to counsel grounds, in an opinion which stated:

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," *Gideon v. Wainwright*, 372 U.S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial. (378 U.S., at 490-491)

The Government has argued that *Miranda* and *Escobedo* were not intended to vindicate the Sixth Amendment right to counsel but rather were intended to insure the full effectuation of the Fifth Amendment privi-

lege against compulsory self-incrimination, citing *Johnson v. New Jersey*, 384 U.S. 719 (1966) and *Kirby v. Illinois*, 406 U.S. 682 (1972). However, *Johnson v. New Jersey*, *supra*, merely decided the issue of whether *Miranda* and *Escobedo* were retroactive, and nothing more. *Kirby v. Illinois*, *supra*, did not overrule *Escobedo*. Rather, *Kirby* notes that *Escobedo* is the one case where the Sixth Amendment right to counsel did attach prior to indictment. Nowhere is it ever suggested that *Escobedo* should be overruled. On the contrary, this Court has been careful to protect the accused's Sixth Amendment right to counsel in interrogation situations, although admittedly recent cases have all involved post-indictment situations. See, *Estelle v. Smith*, 451 U.S. 454 (1981); *United States v. Henry*, 447 U.S. 264 (1980). See also, *Moore v. Illinois*, 434 U.S. 220 (1977)

A critical stage in the prosecution was reached in the present case when Respondent was placed in solitary confinement, deprived of counsel, and excluded from participation in the investigation into the prison homicide in which he was a suspect. Respondent's placement into solitary confinement was the first step in the prosecution by the Government of its case against the Respondents and his co-defendants. The Government's argument that the administrative detention of a prisoner who is a suspect in a prison crime is not accusatory, is an argument that ignores the reality of what occurred in this case. The placement of the Respondent in solitary confinement was not merely a security measure. If it was only a security measure, there would have been no criminal prosecution. Here, there was such a prosecution.

The Government argues that administrative detention should not be viewed as a formal accusation which generates a Sixth Amendment right to counsel, because there

are other reasons for administrative detention. See, 28 C.F.R. 541.22(a).¹² However, in this case, the primary reason Respondent was placed in administrative detention was because he was pending investigation and trial for a criminal act. Furthermore, he remained there for twenty months. Thus, it is under these circumstances that the Ninth Circuit held that Respondent became an accused entitled to a Sixth Amendment right to counsel.

Reliance upon *United States v. Marion*, 404 U.S. 307 (1971), a speedy trial case, by the Ninth Circuit was in the nature of an analogy. In *Marion*, this Court stated that "the Sixth Amendment speedy trial provision has no application until the punitive defendant in some way becomes an 'accused'." (404 U.S. at 313) One may be an accused even before he is indicted if he has been arrested

¹² Section 541.22(a) provides, in part:

The Warden may place an inmate in administrative detention when the inmate is in holdover status (i.e., en route to a designated institution) during transfer, or is a new commitment pending classification. The Warden may also place an inmate in administrative detention when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution and when the inmate:

- (1) Is pending a hearing for a violation of Bureau regulations;
- (2) Is pending an investigation of a violation of Bureau regulations;
- (3) Is pending investigation or trial for a criminal act;
- (4) Is pending transfer;
- (5) Requests admission to administrative detention for the inmate's own protection, or staff determines that admission to or continuation in administrative detention is necessary for the inmate's own protection (See 541.23); or
- (6) Is terminating confinement in disciplinary segregation and placement in general population is not prudent.

and held to answer. This was made clear in *United States v. Marion*, 404 U.S. 307, 320-321 (1971) when the Court held:

So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer. (Id., at 320-321)

The analogy to Respondent's case is simply the recognition that when the Respondent was placed in administrative detention and was told at an administrative hearing that he was guilty of murder, he became an accused. This occurred within one week after first being placed in administrative detention. Thereafter, when his confinement in administrative detention became unreasonably long, he was entitled under the Sixth Amendment to either (1) a release from administrative detention, or (2) to the appointment of counsel, or (3) to a speedy indictment and prosecution on the charge of murder.

In order to avoid their Sixth Amendment obligations, the Government argues that the placement of Respondent in solitary confinement for twenty months had little effect on Respondent's right or ability to investigate and prepare his defense to the murder charge. The Government implies that there was little difference between being in solitary confinement rather than the general

population, presumably because prison crimes are inevitably more difficult to investigate than nonprison crimes.

The major harm, however, was the elementary unfairness in allowing the FBI to thoroughly investigate and interview potential witnesses, while at the same time, the Government denies the Respondent a similar access to potential witnesses, to investigate and to prepare his defense. Once again, the time period is important. This occurred over a twenty-month period. Placing Respondent in solitary confinement without counsel removed Respondent from access to all of the witnesses. This was a substantial burden to be placed upon an accused inmate who seeks only the right and opportunity to prepare his defense.

The Government raises several reasons in order to justify this unfairness. None of these reasons survive close analysis. It is suggested that there is little basis in any criminal case for supposing that suspects ordinarily attempt their own preindictment investigations. Respondent's case, however, is different. Just nine days after being placed in solitary confinement, Respondent was told by prison officials at his administrative hearing that he was guilty of murdering Thomas Trejo. Under these circumstances, preindictment investigation by the defense would certainly have occurred.

It is also suggested that Respondent could have used a prison staff member who was available at the prison disciplinary hearings. However, a prison staff member is not a lawyer or a trained investigator. There is no attorney-client privilege affording the prisoner confidentiality. Rather, the staff member is an employee of the very same prison system which seeks to prosecute him at the disciplinary hearing. It is simply unacceptable

to think that a prison staff member could somehow substitute for the "guiding hand of counsel" envisioned in *Powell v. Alabama*, 287 U.S. 45, 69 (1932). On the contrary, several prison staff members testified as Government witnesses during the trial because they acted as criminal investigators for the prosecution. For example, it was a prison staff member who secured the crime scene. And another staff member located the murder weapons which had been discarded after the murder.

Equally unacceptable is the Government's suggestion that Respondent could have cleared himself and preserved the names of witnesses by providing full information concerning his activities to the FBI. The Respondent, however, had an absolute Fifth Amendment privilege to remain silent rather than to submit to custodial interrogation by the FBI. *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, this Court noted that "Custodial interrogation . . . does not necessarily afford the innocent an opportunity to clear themselves." (384 U.S. at 482). And in *Escobedo v. Illinois*, 378 U.S. 478, 488 (1963), this Court quoted from an earlier decision where it was noted that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." (378 U.S., at 488) This Court should, therefore, reject the argument that Respondent must give up his Fifth Amendment right as a condition of being afforded an opportunity to investigate and prepare his defense.

The Government has also suggested that Respondent, in solitary confinement, had access to the prison grapevine in order to investigate the case, because there was evidence of conversations between inmates in administrative detention and those in the general population through windows or vents. However, this assumes that

all potential defense witnesses will somehow seek out the Respondent and attempt to communicate with him in violation of prison regulations.¹³ That assumption is unrealistic.

Lastly, the Government calls into question the legitimacy of any investigation conducted by an inmate-suspect, stating that it may take the form of intimidating witnesses and suborning perjury. In the next paragraph, the Government suggests that the numerous deceased and missing witnesses were simply invented by the Respondents.¹⁴ While recognizing that those possibilities

¹³ The Government additionally notes that Respondent was not placed in administrative detention until December 4, 1978, three weeks after the murder of Trejo and there is no indication that Respondent took advantage of this three-week period to investigate and prepare a defense. However, prior to December 4, 1978, Respondent was not accused of the murder of Thomas Trejo and would have no reason to investigate or prepare a defense.

The Government also states that there is no need to investigate if an inmate asserting an alibi already knows who he was with at the time of the crime. But in this case, Respondent only knew some inmates by nicknames and he desired to investigate whether other persons in the gymnasium saw him there during the critical time period, even if he did not see them.

Although defense counsel were provided with inmate rosters, photographs of all inmates at Lompoc Prison during November of 1978 were never provided. But even more important was the fact that the inmate rosters were two years old when examined by defense counsel. By then, inmates had died or had been released from custody, and those who were still in prison would be interviewed for the first time by a defense representative two years after the event. Two years later, the witnesses could not remember critical facts. These failures of recollection inevitably decreased their value as defense witnesses.

¹⁴ By extending the Government's logic, it could be said that in any criminal case it is unnecessary to allow the accused an opportunity to

exist, it still does not justify removing the inmate-suspect from any opportunity to conduct an investigation. That is what occurred in this case. Indeed, the Ninth Circuit's remedy of appointing counsel would seem to minimize the danger of intimidation and subornation.

Although there is presently no statutory authority for the appointment of counsel, this should not be a factor in determining whether the Sixth Amendment right to counsel exists in the first instance. Indeed, the wholesale appointment of counsel for inmate suspects in administrative detention may not be the Government's response at all.

The case of *Miranda v. Arizona*, 384 U.S. 436 (1966) did not result in the placement of lawyers at police stations for the purpose of being appointed to represent suspects during custodial interrogation. It resulted in the termination of all police interrogation when the suspect, after being informed of his right to counsel, requested counsel to be present at the interrogation.

In the same manner, the Ninth Circuit's opinion in the *Gouveia* case will not result in the placement of lawyers in the prisons to assist the prisoners in the investigation of their cases. It will, however, result in the Government avoiding in the future those situations in which a prisoner is placed in solitary confinement for twenty months prior to indictment without the assistance of counsel during that time.

testify in his own defense, because it would be a simple matter for him to invent a defense. Yet this Court has stated unequivocally that "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)

Although the Ninth Circuit's opinion in this case focuses upon the right to counsel, it also rests in part upon the fact that the Government unnecessarily delayed bringing the indictment in this case. During that period of delay, the Government slowly investigated and prepared its case, while the Respondent was kept in isolation away from the assistance of counsel. After the passage of twenty months, when counsel was finally appointed to represent the Respondent, the case was finally appointed to represent the Respondent, the case had become so old that Respondent's constitutional right to the effective assistance of counsel was infringed upon. Thus, the Ninth Circuit's opinion is designed to prevent, in the future, long delays in the initiation of criminal charges in cases involving prison crimes. The ultimate effect, of course, is to protect the accused's right to counsel, recognizing the fact that counsel's effectiveness can best be assured by his early entry into the case on behalf of the accused.

II

The Dismissal Of The Indictment Was An Appropriate Remedy In This Case For Violation Of The Sixth Amendment Right To Counsel

The Government has also argued that dismissal of the indictment was not the appropriate remedy in this case, even assuming that a violation of the right to counsel has occurred. The Government relies upon this Court's recent opinion in *United States v. Morrison*, 449 U.S. 361 (1981).

In *Morrison*, this Court held that dismissal of an indictment because of a violation of the Sixth Amendment right to counsel is not an appropriate remedy unless there is some showing of an adverse consequence to the represen-

tation of the accused or to the fairness of the proceeding leading to conviction. In *Morrison*, this Court found that no prejudice occurred when the accused was visited by Government agents in the absence of her counsel. Thus, dismissal of the indictment was not appropriate under the facts of the *Morrison* case.

However, the Court's opinion in *Morrison* did not reject the remedy of dismissal in the appropriate case. This Court stated that "Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *United States v. Morrison*, 449 U.S. 361, 365 (1981).

In some cases, the appropriate remedy is to reverse the conviction and order a new trial at which evidence obtained in violation of the right to counsel is suppressed. See, *Massiah v. United States*, 377 U.S. 201 (1964); *United States v. Wade*, 388 U.S. 218 (1967); *United States v. Blue*, 384 U.S. 251 (1966). But where there is a continuing prejudice which cannot be remedied by a new trial or suppression of evidence, this Court has recognized that dismissal of the indictment is the appropriate remedy. *United States v. Morrison*, *supra*, at 366 n.2, citing *United States v. Marion*, 404 U.S. 307, 325-326 (1971). In the Court's own words, what must be shown is "demonstrable prejudice, or substantial threat thereof." *United States v. Morrison*, *supra*, at 365.

In the Respondent's case, the Ninth Circuit found a substantial threat of prejudice by the twenty-month delay in providing the Respondent counsel. The Court stated:

The "taint" in the present case is that lengthy preindictment isolation without the assistance of counsel handicapped appellants' ability to defend

themselves at trial. Prison crimes present suspects with unique investigatory and evidentiary obstacles. And, to repeat, the passage of time greatly exacerbates these difficulties. The length of delay in appointing counsel for appellants who were likewise denied the opportunity to take measures to preserve their own defense means that the critical initial stage of investigation was forever lost to appellants. *United States v. Gouveia*, 704 F. 2d 1116, 1125.

The Ninth Circuit also found demonstrable prejudice. Indeed, the instant case is one where there is a continuing prejudice that cannot be remedied by mere reversal of the conviction or suppression of evidence. Each of the Respondents were unable to locate defense witnesses because the witnesses, many known only by nicknames, were transferred to other institutions, released from custody, or died before the Respondents were indicted and afforded counsel. The Government's delay in indicting the Respondents infringed upon their right to counsel because of counsel's inability to locate and present these defense witnesses. Because the blame is properly placed upon the Government for this infringement of the right to counsel and because it affects the fairness of the proceeding which led to the convictions, dismissal of the indictment is the appropriate remedy in this case.

Petitioner's demand for a more specific inquiry into actual prejudice is misplaced in the context of this case. It should be noted that the present case involves a situation wherein counsel was prevented from discharging his normal functions by governmental actions. More specifically, the Government failed to appoint counsel at a time when counsel could effectively discharge his normal functions.

In the case of *Cooper v. Fitzharris*, 586 F. 2d 1325 (9th Cir. 1978), the Ninth Circuit distinguished, in the harmless error context, those cases in which prejudice must be

shown in some specific fashion from those in which no specific showing of prejudice is required when an ineffective assistance of counsel claim is made. The Ninth Circuit indicated that:

When no counsel is provided, or counsel is prevented from discharging his normal functions, the evil lies in what the attorney does not do, and is either not readily apparent on the record, or occurs at a time when no record is made. "Thus an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation," [citation] and a rule requiring that the record reflect that the defendant was "prejudiced . . . in some specific fashion would not be susceptible to intelligent, even-handed application." [citation] This situation is to be distinguished from the usual one in which a harmless error rule is applied: "In the normal case where a harmless error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury." (586 F. 2d at 1332)

Thus, when the Ninth Circuit found a presumption of prejudice in the Respondent's case, it was merely recognizing that under certain circumstances, a violation of the Sixth Amendment right to counsel is prejudicial per se. This occurs where there is no counsel provided, as in *Gideon v. Wainwright*, 372 U.S. 335 (1963) or where counsel is prevented from discharging functions vital to effective representation of his client. See, *Geders v. United States*, 425 U.S. 80 (1976) (counsel prevented from conferring with client during mid-trial recess); *Herring v. New York*, 422 U.S. 853 (1975) (counsel not permitted to give summation); *Holloway v. Arkansas*, 435 U.S. 475 (1978) (counsel had conflict of interest); *Powell v. Alabama*, 387 U.S. 45 (1967) (counsel appointed too late to prepare for trial).

Thus, in *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961), this Court stated that "When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." And in *White v. Maryland*, 373 U.S. 59, 60 (1963), this Court stated that "the rationale of *Hamilton v. Alabama*, *supra*, does not rest, as we shall see, on a showing of prejudice." It was this same type of consideration which led the Ninth Circuit to find a presumption of prejudice under the facts of the Respondent's case. By delaying the appointment of counsel for almost two years, the Government prevented counsel from discharging functions vital to the effective representation of the Respondent.

The Government's reliance upon *United States v. Valenzuela-Bernal*, No. 81-450 (July 2, 1982) is misplaced. This Court's decision in *Valenzuela-Bernal* was concerned with the dismissal remedy in the context of the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment. In that case, the Government deported two of three illegal alien material witnesses, who were passengers in a vehicle in which the defendant had been arrested. This Court held that absent some showing that the testimony of the missing witnesses would be both material and favorable to the defendant, the indictment should not be dismissed.

The *Valenzuela-Bernal* case is distinguishable from Respondent's case on several grounds. The Respondent's case involves the Sixth Amendment right to counsel, not the Compulsory Process Clause. In *Valenzuela-Bernal*, the Court was also especially concerned with the Government's vital interest in regulating immigration, a consideration absent in Respondent's case. And, finally, no effort was made in *Valenzuela-Bernal* by the defendant to explain how the deported passengers could assist him

in proving his innocence. In Respondent's case, on the other hand, the showing was made that the missing witnesses were alibi witnesses who would testify that the Respondent was at another location at the time of the killing.

Although it is true that Respondent was able to produce some, but not all of his alibi witnesses, his failure to produce all of such witnesses was caused by the Government's failure to provide counsel. And finally, as the Ninth Circuit's opinion points out, it is not the quantity of defense witnesses that is important, it is their quality. *United States v. Gouveia*, 704 F. 2d 1116, 1326 (9th Cir. 1983). The fact that some alibi witnesses testified does not cure the "other prejudicial factors such as the dimming memories of witnesses whose testimony the defense had no opportunity to record at a time when events were fresh and the deterioration of physical evidence." (*Id.*, at 1326) Therefore, dismissal of the indictment in Respondent's case was the appropriate remedy.

CONCLUSION

Based upon the foregoing, Respondent urges the Court to reverse the convictions and to order the indictment dismissed.

Respectfully submitted,
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Robert Ramirez

FILED

FEB 3 1984

ALEXANDER L. STEVAS.

CLERK

No. 83-128

In The
Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

WILLIAM GOUVEIA, et al.,

Respondents.

WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT ADOLPHO REYNOSO

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QUESTIONS PRESENTED

1. Whether, under any circumstances, a federal prisoner placed in administrative detention for an indeterminate period of time, on suspicion of committing a crime in prison and undergoing a criminal investigation is constitutionally entitled to an attorney prior to indictment?

2. Whether dismissal of the indictment is the appropriate remedy where an indigent federal prisoner is held in solitary confinement for 19 months as a suspect in a murder investigation and his requests for appointed counsel are denied until he is formally indicted 20 months after the alleged crime?

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption of this case, Adolpho Reynoso, Robert Ramirez, Philip Segura, Robert Eugene Mills, and Richard Raymond Pierce were appellants below and are respondents here.

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UNITED STATES OF AMERICA,

Petitioner,

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WILLIAM GOUVEIA, et al.,

Respondents.

**WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF OF RESPONDENT ADOLPHO REYNOSO

STATEMENT

This case raises the question of whether the Sixth Amendment right to effective assistance to counsel requires that counsel be appointed for an indigent prison inmate under criminal investigation during the time that he is held in administrative segregation as a suspect fol-

lowing the alleged offense, but before the filing of an indictment.

1. Factual Background of Respondent Reynoso's Case

On October 13, 1978, Respondent Reynoso became an inmate at the Federal Correctional Institution at Lompoc, California. On October 20, 1978, respondent was transferred to "J" Unit at Lompoc. (J.A. 15)

On November 11, 1978, an inmate named Thomas Trejo was stabbed to death in "M" unit at Lompoc. There were no eyewitnesses to the murder. The body of Trejo was discovered at approximately 4:00 in the afternoon.

That evening, Respondent Reynoso, along with Pedro Flores (acquitted in the first trial of all counts), was placed in the Administrative Detention Unit (ADU) at Lompoc, a unit segregated from the general prison population. (J.A. 8, 10, 15, 44, 50)

As a result of his placement in ADU, Respondent Reynoso was confined to a one-man cell measuring four feet by six feet, around the clock, with the exception of thirty (30) minutes per day. During this thirty-minute period, Respondent had the option to either shower or exercise on a weight machine within the unit corridor. Respondent was permitted absolutely no contact with other prisoners within ADU or with the general prison population. Once every seven days, Respondent was taken to a segregated concrete yard to exercise. Respondent was permitted one telephone call per month which had to be made in the presence of a counselor, guard or

case manager. Any communication with other inmates was prohibited. (J.A. 17-18)

On November 21, 1978, Respondent Reynoso was interviewed by agents of the Federal Bureau of Investigation (FBI). Respondent was not advised of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1965) (J.A. 15, 23). Nevertheless, Respondent requested that he be provided an attorney. Respondent was told by the FBI agents that he didn't need one since he was going to be released the next day. (J.A. 15) During the interview, Respondent told the FBI that on November 11, 1978, he watched several football games, including one between Oklahoma and Nebraska. Respondent told the FBI that he watched these games with inmate Pedro Flores and a white male who resided in "J" Unit, in cell E-18. In the early afternoon, (2:00 p.m.) he went to the gym and worked out. He told the FBI this could be verified by a black officer who was working in the gym. Respondent also told the FBI that after the workout, he played shuffle-board with an inmate by the name of "Sam" who resided in "C" Unit. (J.A. 23-24)

On November 22, 1978, Respondent, as advised by the FBI, was released to the general prison population and placed in "J" Unit. Respondent believed that he had been cleared of the charges. (J.A. 15, 19) It is not known if the FBI attempted to locate and interview any of the individuals mentioned in its "Report of Interview" of Respondent.

On December 4, 1978, Respondent was again placed in ADU. He was told that he was being held pending the criminal investigation for the murder of Thomas Trejo. From December 4, 1978 to the present, respond-

ent has been segregated from the general prison population at Lompoc, California. (J.A. 15)

On December 15, 1978, and again on December 21, 1978, respondent appeared before the Prison Administrative Disciplinary Committee. Respondent requested appointment of an attorney and was denied said request. He also requested the presence of a prison guard named Vernel Phillips. However, no attempts were made by prison officials to produce Mr. Phillips for the hearing. Instead, Respondent was told that Mr. Phillips was no longer employed by the Federal Correctional Institution at Lompoc. No witnesses were produced at the hearing by prison officials. (J.A. 15-16)

From December 4, 1978, until Respondent's arraignment on July 14, 1980, Respondent remained in ADU and without assistance of counsel. No investigation was conducted; no evidence was preserved on behalf of the Respondent; no witnesses were interviewed; and no statements were recorded.

The United States Attorney's Office was involved in the case as early as January, 1979. The Grand Jury commenced its consideration of the case against Respondent in March, 1979. (Tr. D. 126-128)¹

The Government, by March, 1979, had virtually completed its investigation into the murder of Trejo. All witnesses called before the Grand Jury, and known to the Government at the time of indictment, had been located and interviewed prior to June, 1979. Dr. Gee, who performed the autopsy of Trejo, was available to

¹"Tr. B" signifies the transcript of the pre-trial hearings in the case of the Gouveia respondents.

the Government as early as November 11, 1978. (Tr. 147)² Richard Villalobos, an inmate, was interviewed as a cooperating Government witness in June, 1979. (Tr. 220-221, 297-298) The principal witnesses at the Grand Jury proceeding, including Willard Taylor, a prison inmate, were known and available as early as November, 1978. (Tr. 880-881) No new percipient witness became available to the Government between June, 1979 and the date of indictment. Virtually all scientific evidence was completed by April, 1979. No significant investigative activity was engaged in by the Government after June, 1979. (Tr. 393, 434)

In contrast, the defense lost the ability to develop a qualitatively sound defense.

Although Respondent placed on the stand at his trial two witnesses, Pedro Flores and Harlen Fergurson, who testified that they were with Respondent in "J" Unit watching football, no witnesses could be located who could testify about the subsequent activities of Respondent. For example, the black prison guard could not be located to corroborate that Respondent was at the gym in the early afternoon at approximately 2:00 p.m.—a time within which the murder could have been committed. This inability to locate this witness resulted despite the fact that Respondent told the FBI that a black officer working in the gym could verify that Respondent was at the gym in the early afternoon at about 2:00 p.m. (J.A. 23) The inmate named "Sam", with whom Respondent

²"Tr." signifies the transcript of the re-trial in the case of the Gouveia respondents.

told the FBI that he had played shuffle-board, could not be located and was not produced.³

Trial began on September 16, 1980. The jury acquitted Flores on all counts and acquitted Respondent Reynoso on the weapon conveyance count. However, the jury was unable to reach a verdict on the "murder and conspiracy charges against Respondents, and a mistrial was declared on those counts". (J.A. 1)

On February 2, 1981, Respondents resubmitted their motion to dismiss the indictment on the ground that they had been denied their right to a speedy trial, due process of law, and effective assistance of counsel. The motions were considered and denied. (Tr. D. 7-8)

2. The Decision of the Court of Appeals

The en banc Court of Appeals consolidated the *Gouveia* and *Mills* cases. By a vote of six to five, it reversed the convictions and remanded for dismissal of the indictments. The Court of Appeals held that an indigent inmate held in administrative detention beyond ninety days for the purpose of isolating him from the general prison population pending a criminal investigation, or trial for a criminal act, must be afforded an attorney at Government expense in order to preserve assurances of a fair trial. *United States v. Gouveia*, 704 F.2d 1116 (9th Cir. 1983).

³The above testimony was relevant to impeach the testimony of Gene Newby. Gene Newby did not testify at the first trial. During the second trial, Newby testified that Reynoso, along with Pedro Flores and the Gouveia Respondents were in "H" unit in the early afternoon shooting-up heroin and tearing up and flushing down the toilet bloody clothes. (Tr. 1011-1013, 1153-1157)

The Court reasoned that when administrative detention "is ordered as a disciplinary measure or to prevent disorder it is indeed a matter of internal prison administration. But when used to isolate an inmate pending trial both its purpose and effect is accusatory". (Pet. App. 15a)

The Court, having concluded that the circumstances of the present case gave rise to the right to counsel, fashioned a rule which preserves the right to effective assistance of counsel without impairing the authority of prison officials to carry out their administrative responsibilities. (Pet. App. 15a) The Court held that "(i)f an inmate is held after the maximum disciplinary period has expired, he should be allowed to show that his detention, at least in part, is due to pending investigation or trial for a criminal act." (Pet. App. 17a) If the inmate establishes indigency and requests counsel, "prison officials must either refute the inmate's showing, appoint counsel, or release the inmate back into the general prison population". (*id*) The court concluded that the Government's refusal to appoint counsel to Respondents denied them effective assistance of counsel and, therefore, a fair trial. (Pet. App. 23a)

The court, having concluded that the Government's conduct in this case resulted in harm which pervaded the entire trial and thus resulted in harm which was not capable of after-the-fact remedy, concluded that Respondents were in a position similar to suspects who were denied a speedy trial. Thus, dismissal of the indictment was the only certain remedy. (Pet. App. 20a-21a)

The court further reasoned that mere quantity of witnesses is not dispositive to the issue of prejudice. Quality

of witnesses is also a significant factor which must be weighed. A large quantity of witnesses with faded memories creates its own prejudice due to a lack of weight such testimony would receive. The problem of "dimming memories of witnesses whose testimony the defense had no opportunity to record at a time when events were fresh" (Pet. App. 23a) was a prejudice created by the isolation of Respondents and the concurrent refusal to appoint counsel who could have preserved such testimony.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals held that the Sixth Amendment requires appointment of counsel for indigent inmates held in administrative detention for more than ninety days pending a criminal investigation. It held further that dismissal of the indictment is the proper remedy for failure to provide counsel under such circumstances.

1. Respondent was placed in the administrative detention unit at Lompoc after being identified as a suspect in a prison murder. The Respondent was interviewed by the FBI. During the FBI interview, Respondent requested appointment of counsel. It was denied. Approximately six weeks after the murder, a administrative disciplinary hearing was held. Respondent at that time requested appointment of counsel. That request was denied.

Respondent remained in ADU from December 4, 1978 until June, 1980. He was kept in ADU beyond a ninety-day period pending investigation for a criminal act. (J.A. 85-88). During the nineteen month period, Respondent's defense case deteriorated substantially. Respondent was

unable to locate two witnesses who could have testified as to Respondent's activities during the early afternoon; a time when the murder could have been committed. A Michael Thompson, who the defense contended had actually committed the murder, died of natural causes before counsel was appointed to Respondent. Other witnesses had observable diminished memories.

Respondent argues that the right to counsel is essential to a fair trial. In a prison setting, the right to counsel should attach in order to enable a prison inmate segregated in ADU for an indeterminate period of time the ability to preserve his defense. Only counsel may ameliorate the disadvantage of a segregated inmate in preparing and securing the means to present a defense at trial.

2. Respondent's segregation in ADU was the functional equivalent of an arrest. Respondent suffered the indicia of arrest set forth in *United States v. Marion*, 404 U.S. 307, 320 (1971). Had Respondent been outside prison as a free man and subjected to an equivalent detention, the Government could not have detained him for an unreasonable period of time without bringing formal charges. However, in the prison context, the Government was able to detain the Respondent for an indeterminate time without filing formal charges. During the pre-indictment period, the Government systematically built its case; while the Respondent was functionally under arrest.

The segregation of Respondent for an indeterminate period of time and the manner in which the Government conducted its investigation, indicates that the Government had committed itself to prosecute. At that point, the prosecutorial forces of society were focused on the Respondent. This commitment to prosecute by the Government coupled

with the functional arrest of Respondent, requires that counsel be appointed prior to indictment in order to protect Respondent's right to a fair trial.

3. The remedy of dismissal was appropriate in Respondent's case due to the presence of actual prejudice. Respondent lost the resources to present a complete defense. Two witnesses could not be identified and located who could testify as to the activities of Respondent in the early afternoon on the day of the murder. This was critical because the murder could have occurred in the early afternoon. Additionally, the Respondents demonstrated that their witnesses did in fact have poor memories as to the events of November 11, 1978—the date of the murder.

ARGUMENT

- I. The Sixth Amendment Requires That Counsel Be Appointed For An Indigent Prison Inmate When The Inmate Is Intentionally And Continuously Isolated From The General Prison Population, An Administrative Decision Has Been Made That The Inmate Is Guilty, And He Is The Subject Of A Continuing Criminal Investigation.**

The Court of Appeals decision achieves a proper balance of interests of both prison officials and inmates suspected of crime. It does not prohibit the prison system from placing an inmate in ADU, nor does it require appointment of counsel where an inmate is placed in ADU for purely administrative reasons, such as protection of other inmates. The Court of Appeals does require that

in order to insure effective assistance of counsel and thereby a fair trial, counsel be appointed to those inmates who are continuously segregated from the general prison population, who have been kept in segregation for more than ninety (90) days, and are the subject of a continuing criminal investigation or are pending trial. (Pet. App. 14a-18a).

The underlying rationale for the Court of Appeals holding is to assure that the accused will receive effective assistance of counsel by providing counsel at a point in time when he can be effective in preserving a defense. (Pet. App. 16a)

A. The Sixth Amendment Protects A Person's Right To A Fair Trial.

The right to counsel is more than mere formalism; it is central to the right to a fair trial. The right goes beyond the attorney's mere presence at formal judicial proceedings. *McMann v. Richardson*, 347 U.S. 759 (1970). The concept of the right to counsel:

"... is central to that principle that ... the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in Court, or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment ..."

United States v. Wade, 388 U.S. 218, 226-27 (1967).

Counsel is an instrument utilized to insure the right to a fair trial. Therefore, not only must counsel be provided to an indigent person at the trial of a criminal pros-

ecution, *Gideon v. Wainwright*, 372 U.S. 335 (1963), but, counsel must be appointed at a point in time when counsel can be effective in preserving the right to a fair trial. *United States v. Wade*, 388 U.S. 218, 226-27 (1967); *Powell v. Alabama*, 287 U.S. 45 (1932).

This Court, in *Powell v. Alabama*, stated that the duty to appoint counsel:

"is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

Appointment of an attorney at a meaningful stage after the Government has detained an inmate-suspect in ADU, due to a continuing criminal investigation, or for trial, is necessary to provide a defendant with the means to prepare and preserve his version of the facts at trial. Without the means to preserve, and thus present his case, the adversary system's entire integrity becomes suspect. Where the defendant is unable to fully present his case, the adversary system becomes a one-sided proceeding in which only the Government is in a position to develop and present its case.

That the defendant must have a fair opportunity to present his evidence to the trier of fact is a cornerstone of the adversary system of criminal justice. In *United States v. Nixon*, 418 U.S. 683, 709 (1974), the court addressed this issue:

We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice

would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on a full disclosure of all the facts, within the framework of the rules of evidence.

The Petitioner appears to suggest that the Respondent's production of two alibi witnesses is dispositive of the issue of prejudice created by the absence of counsel. (Pet. Br. 56-58) What the Petitioner fails to recognize is that it is the quality of witnesses that determine lawsuits, not mere numbers. Additionally, the ability to present a small portion of the facts does not equal an effective defense.

The Respondent was able to present to the jury evidence of his activities on the morning of the murder. However, no evidence was produced as to his activities during the early afternoon of the same day. This was critical because the time of death was approximated to have occurred between 12:00 noon and 1:00 p.m., with a range of one hour in either direction. (Tr. 160, 162-63) That is, the murder could have occurred at 2:00 p.m., if not later. Respondent told the FBI on November 21, 1978, that in the early afternoon at about 2:00 p.m. he was in the gym playing shuffle-board with an inmate named "Sam" from "C" Unit. He told the FBI that the above fact could be verified by a black guard who was in the gym. (J.A. 15, 23-24)

Respondent was unable to either identify or produce the black guard from the gymnasium. The guard could have testified that in the early afternoon he had seen the Respondent at the gym. Respondent was also unable to

locate the inmate named Sam, who could have testified that in the early afternoon, at approximately 2:00 p.m., he was playing shuffle-board with the Respondent. These individuals were not fabrications by Respondent months after the murder. The existence of these individuals as potential witnesses for the defense was made known to agents of the Government as early as November, 1978. (J.A. 23-24) To summarize, Respondent was able to produce two witnesses who could account for a portion of the time at which the murder could have occurred, but not for all of the time. The inability to produce reliable evidence as to a portion of the critical time made the defense far less persuasive than it would have been if the defense had been able to identify and produce the above-mentioned persons. See *Chambers v. Mississippi*, 410 U.S. 284 (1972).

The mere opportunity to present some evidence as to a fact in dispute is insufficient if a defendant is precluded from presenting additional evidence which, if believed, would make the defense far more persuasive. *Chambers v. Mississippi*, *id.* In *Chambers v. Mississippi*, the Court held that the trial court's refusal to allow testimony of three impeachment witnesses constituted reversible error. The Court held that the exclusion of the witnesses made the defense far less persuasive, and, therefore, the defendant had been denied due process of law. The Court reversed the conviction even though the defense had produced substantial evidence in support of its defense theory. As in *Chambers*, the issue is not whether the Respondent was able to produce some portion of the evidence in support of his defense, but whether he was denied the right to produce a persuasive defense.

The failure of a defense counsel to present important evidence due to incompetency is no more prejudicial to a defendant than the failure to present that same evidence due to its unavailability to defense counsel. If a defendant can not present a sound defense, due to his inability to preserve evidence, is he any less harmed in his defense than the defendant in *Chambers v. Mississippi*, who was not permitted to produce all the relevant evidence which was available? The answer must surely be that the denial of a fair trial is the same to a defendant whether the denial is the result of incompetency of counsel, an incorrect ruling of the trial court, or the inability of counsel to present evidence which has been forever lost.

Petitioner attempted to minimize the effect of the absence of counsel on the Respondent's ability to preserve and present an effective defense. The denial of a fair trial was a result of what counsel was unable to do because of the lengthy pre-indictment period. Contrary to the Petitioner's contention (Pet. Br. 58), there was substantial prejudice to the Respondent due to his loss of witnesses and the low reliability of defense witnesses resulting from their demonstrated poor memories.

The Respondent's affirmative defense was that Michael Thompson and two Government witnesses—Steve Kinard and Willard Taylor—had committed the murder of Trejo. While Steven Kinard and Willard Taylor admitted assisting in the murder by disposing of the murder weapons, they denied any association with Michael Thompson (Tr. 2096-2111, 2222-2232, 2483-2495)

A witness was called in an effort to establish that Michael Thompson had in his possession, on the date of

the murder, a bundle that appeared to contain steel knives. That witness, Tony Estrada, had a demonstrably faded memory. In this regard, the trial court itself made the following observation:

THE COURT: Well, the Court has to rule as it sees fit, using its discretion. This witness's memory is at best a faded pastel of what was once a brilliant picture. Whether it ever encompassed the name of the decedent, his nickname, the fact that anybody had been put in segregation, is of extreme doubt to the Court. And I think because of the fact his recollection is so deficient in so many areas, that there must be a specific demonstration of when this event occurred. Now, that's the foundation that's necessary. If that's made, then these matters are admissible. That will be the ruling of the Court. (J.A. 117)

Clearly, this witness's lack of memory clouded his reliability and, therefore, his credibility. The fact that Michael Thompson had a set of knives on the date of the murder could not be convincingly proven.

Faded memory was also demonstrated by a number of other witnesses, including Antonio Palacios, (J.A. 93-98) Raymond Olvera, (J.A. 98-102) and Stephen A. Broughton. (J.A. 102) As to each of these witnesses, the prosecution's line of cross-examination was to demonstrate a lack of certainty and a lack of recollection as to their testimony. (J.A. 94-97, 100-102, 105, 107-108) It was also demonstrated by Mr. Broughton that this lack of recollection was due to both the passage of time and the fact that the witnesses made no efforts to record their recollections. (J.A. 105) Additionally, no one on behalf of the Respondent contacted them in 1978 or even 1979 to take statements and attempt to preserve their memory of the events occurring on November 11, 1978.

Michael Thompson, the person the defense contended was (along with Government witnesses Kinard and Taylor) involved in the murder, died of natural causes in June of 1979. The death of Michael Thompson denied Respondent the opportunity to call Thompson as a hostile witness and have him subjected to cross-examination. Since an attorney was not appointed to represent Respondent until after the death of Thompson, his testimony was not preserved. Thus, Respondent was frustrated in his attempt to demonstrate to the jury that Thompson was one of the murderers, along with Kinard and Taylor.

The deficiencies of the Respondent's affirmative defense occurred despite the fact that Respondent adopted a course of conduct consistent with the remedies suggested by the Petitioner. (Pet. Br. 36-39) That is, Respondent told the FBI about his witnesses. That the statements of Respondent were preserved by the FBI has never been in dispute. However, the mere preservation of the statement did not enable Respondent, some twenty months after the murder, to locate either the inmate named "Sam" or the black guard who was at the gym.

Respondent's situation demonstrates the hollowness of Petitioner's bare assertions that an inmate-defendant held in segregation pending criminal investigation or trial may preserve a defense by surrendering his right against self-incrimination. Respondent gave up that most basic of rights on November 21, 1978, but it was not enough to preserve a critical portion of his defense.

The Petitioner's suggestion that if Respondent wanted to prepare a defense he should have used a "staff

representative" is contrary to the most basic and long recognized right against compulsory self-incrimination. *Miranda v. Arizona*, 384 U.S. 436 (1966). The Petitioner ignores the fact that the staff representative is a government employee and that there is no attorney-client privilege. Petitioner's position that an innocent inmate would not reasonably fear that the information given to staff member would be used against him indicates a naivette about the adversary positions of the Respondent and the Government (and its agents). Petitioner surely does not seriously contend that a staff representative could decline to testify against a defendant on the grounds of attorney-client privilege.⁴ Whether the staff representative does or does not desire to act as a spy is immaterial, since the prosecutor can make him a spy merely by asking, "What did he tell you?"

The remedies suggested by Petitioner are simply unconstitutional. Further, they can not provide "the guiding hand of counsel" that the Court in *Powell v. Alabama*, 287 U.S. 45, 49 (1932) found essential.

The record reflects that Respondent was denied a fair trial due to the absence of counsel at a time when he was segregated from the general prison population. The issue remains whether he was entitled to appointment of counsel prior to the Government's filing of the indictment.

⁴Section 950 of the California Evidence Code defines "Lawyer" to mean: "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation." It is clear that a "staff representative" even a counselor or social worker does not fall within the definition of a lawyer.

B. Segregation Of Respondent From The General Prison Population Pending A Criminal Investigation or Trial is the Functional Equivalent of an Arrest and Accusation.

Petitioner concedes that Respondents were kept in administrative detention because of the pendency of the criminal investigation regarding the murder they were suspected of committing. (Pet. Br. 26) The United States Attorney's office was involved in the criminal investigation as early as January, 1979. (Tr. B. 128) The Grand Jury was considering evidence as early as March 1979. (Tr. B. 128) In reality, the Respondents were held in segregation for an indeterminate period of time.

The Court of Appeal recognized that "whether a person stands accused can only be determined from the totality of the circumstances." (Pet. App. 8a) Under the circumstances of this case, the segregation of Respondent was accusatory; it was a "public act" which was functionally equivalent to an arrest. (Pet. App. 15a) In *United States v. Marion*, 404 U.S. 307, 320 (1971), this court set forth the constitutionally significant indicia of arrest for purposes of triggering the Sixth Amendment right to a speedy trial:

" . . . Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends.

Each of the *Marion* incidents of arrest are present in this case where Respondent was placed in a "prison within a prison". Respondent's detention deprived him of the privileges, jobs, and activities of the general prison

population; deprived him of all contact with the general prison population; stigmatized him in the eyes of the prison population; subjected him to possible inmate retaliation; created in him, his family and friends justifiable anxiety; and precluded him from preparing a defense. (JA 15-20)

The Court of Appeals reasoned that where an inmate is isolated, pending a criminal investigation or trial for a criminal prosecution, the detention is related to the subsequent prosecution. Additionally, the detention under such circumstances:

[F]urther[s] many of the same governmental interests served by an arrest outside the prison walls. The Supreme Court has recently recognized that confining inmates to administrative detention pending completion of the investigation of disciplinary charges serves the important need of investigative officers to protect witnesses and evidence, to facilitate an effective investigation, and to prevent further criminal activity by the suspect. *Hewitt v. Helms*, 103 S.Ct. 864 (1983). These interests are important for nonprison crimes and in that situation they lead to an arrest at the earliest possible point. But they are important also for serious prison crimes where the insular character of the inmate population creates unique investigatory and evidentiary hurdles for the prosecution and leaves potential witnesses particularly vulnerable to retribution and coercion. The critical fact is that for prison crimes the Governmental interests that dictate the isolation of suspects do not lead to an arrest, nor prompt the early initiation of formal judicial proceedings, but rather cause the isolation of suspected inmates in administrative detention for what can be an indeterminate period. (Pet. App. 11a)

Respondent's detention under the facts of their case amounts to the functional equivalent of an arrest and accusation.

Petitioner argues that even assuming that Respondent's situation is similar to an arrest, it is not detention by law-enforcement authorities that triggers the right to counsel, but rather the decision by prosecutors to initiate formal adversary judicial proceedings.⁵ (Pet. Br. 29) The Petitioner further states:

The Court of Appeals invoked cases involving the Sixth Amendment right to a speedy trial in support of its arrest analogy. (Citations) But the decisions in those cases make clear that the speedy trial right is not triggered merely by arrest or detention; instead both arrest *and* holding to answer a criminal

⁵The petitioner's position relying on *Kirby v. Illinois*, 406 U.S. 688 (1972) (Plurality decision) that counsel attaches *only* at or after the time that adversary judicial proceedings have been initiated against an accused, and that initiation of adversary judicial proceedings are limited to formal charge, preliminary hearing, indictment, information or arraignment (Pet. Br. 19-21) is not supported by an examination of this court's decision which continue to enjoy constitutional force.

Right to appointment of counsel is not dependent upon the initiation of formal judicial proceedings. Both *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966), involve situations in which no formal judicial proceedings, as delineated in *Kirby v. Illinois*, had occurred. Although, the plurality in *Kirby* stated that the "prime purpose" of *Escobedo* and *Miranda* was not intended to vindicate the Sixth Amendment right to counsel, but rather to ensure full effectuation of the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination (which if waived might render any subsequent trial a mere formality), 406 U.S. at 688, 689. *Miranda* and *Escobedo* continue to require that when an indigent individual is in custody and that individual requests the presence of counsel, he must, if indigent, be provided with counsel before any interrogation may take place.

charge (which is necessary if authorities are to continue to hold a suspect) are required in order to engage the right to a speedy trial. (Emphasis added). (Pet. Br. 30)

Petitioner's reliance on *United States v. McDonald*, 456 U.S. 1, 7 (1982) and *United States v. Marion*, 404 U.S. 307, 320 (1971) for the proposition that the speedy trial right is not triggered merely by arrest or detention and instead by both arrest and holding to answer a criminal charge trigger such right ignores *United States v. Marion's* own language, which states in part:

So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protection of the speedy trial provision of the Sixth Amendment.

Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer. 404 U.S. at 320-321. (Emphasis added).

The Court in *United States v. Marion* and *United States v. McDonald* assumed that a person could not be held under arrest for an indefinite period of time without the filing of charges. Petitioner concedes as much.

What makes this case unique is that the Government was able to both detain and continue to hold the suspect for an indeterminate period of time without filing formal charges. In Respondent's case, the Government was able to segregate him from the general prison population and

subject him to all the indicia of arrest for an indeterminate period of time without the necessity of filing criminal charges. During the twenty month period the Government built its case. During the same period, the ability of the Respondent to preserve his case eventually faded away.

The right to counsel should not be dependent upon the decision of a prosecutor as to when to file an indictment. The right to counsel should attach at the point in time when it is clear that a person is being detained for an indeterminate period of time as a suspect in a criminal investigation.

The Court of Appeals' determination in this case is correct for the additional reason that the Government's actions evidenced a commitment to prosecute. A commitment to prosecute can occur at a time prior to the formal filing of charges.

This Court in, *Coleman v. Alabama*, 399 U.S. 1 (1970) (plurality decision), held that, even though no formal charges were pending at the time of the preliminary hearing and even though the accused had not yet been held to answer charges (since the grand jury had not at that time indicted), the accused was entitled to appointment of counsel at the preliminary hearing. Counsel was required even though the preliminary hearing magistrate could not indict, but could merely make a determination that further inquiry by the grand jury was warranted. 399 U.S. at 24 (C.J. Burger dissent) At the time of the preliminary hearing, the State had committed itself to prosecute, even though no formal charges had been filed. A plurality of the Court required counsel because the

preliminary hearing is a "critical stage" of the criminal process. 399 U.S. 9.

The Court in *Coleman* went on to explain that even though the state was precluded from introducing testimony given at a pre-trial proceeding, where a defendant did not have benefit of counsel, and even though the defendant did not risk loss of defense not asserted at the preliminary hearing, counsel was necessary to safeguard against "potential substantial prejudice to defendants rights" to a fair trial. The benefit of counsel is required under *Coleman* even though the state could, after the preliminary hearing, decide against seeking indictment, or even though a judicial officer could determine that further inquiry by the grand jury was not necessary.

In *Moore v. Illinois*, 434 U.S. 220 (1977), a case factually similar to *Coleman*, this Court held that the preliminary hearing marked the initiation of adversary judicial criminal proceedings where a citizen's complaint had been filed and the accused was subjected to a preliminary hearing. In *Moore, id.* at 228, the court concluded that the time at the preliminary hearing the state had committed itself to prosecute.

However, no formal charges by way of information, or indictment had been brought, and the Government could have abandoned prosecution at any time prior to indictment. In both *Coleman v. Alabama*, and *Moore v. Illinois*, the state was represented by counsel, though it had not filed formal charges. As the court in *Kirby v. Illinois*, 406 U.S. at 689, stated, the initiation of adversary judicial criminal proceedings is far from a mere formalism. "It is only then that the Government has committed itself to prosecute, and only then that the adverse posi-

tions of Government and defendant have solidified . . ." *ibid.*

In Respondent's case the Government manifested its commitment to prosecute by holding Respondent indeterminately segregated in ADU due to a criminal investigation; by its commencing of Grand Jury proceedings in March, 1979; and by the intimate involvement of the United States Attorneys Office as early as January, 1979. This commitment to prosecute was further manifested by the Government's indictment of Respondent despite the fact that all additional investigation conducted after June 1979 was negative as to Respondent.⁶

It is fiction in this case to contend that the Government had not committed itself to prosecute prior to June 1980. To uphold the Petitioner's position that the Government has only committed itself to prosecute after an indictment was filed, creates a fundamentally unfair situation which allows a suspect to be indeterminately detained, while the Government at its leisure prepares its case for trial.

⁶The Government had available by December 26, 1978, with the exception of one witness who became available in June, 1979, all the witnesses that it used to obtain an indictment in June, 1980. For example, Willard Taylor was available in early November, 1978, Armando Macias was available November, 1978; Edward Chaparro was available December 26, 1978. The one exception Richard Villalobos became available in June, 1979.

The scientific evidence was virtually completed by April, 1979. The blood and footprint analysis was completed in April, 1979. (Tr. 393, 434) The autopsy analysis was completed in November, 1979. (Tr. 147) Initial fingerprints analysis was completed in March, 1979. Additional fingerprint comparisons were conducted in October, 1979, however, these additional comparisons also proved negative against Respondent. (Tr. 472)

The Government in the present case, as the prosecution in *Coleman v. Alabama*, 399 U.S. 1 (1970) and *Moore v. Illinois*, 434 U.S. 220 (1977), committed itself to prosecute before the formal charges were filed. The fact that the Government could theoretically have decided not to file charges is unpersuasive in light of the indeterminate detention of Respondent which had all the indicia of arrest.

Petitioner's reliance on *Kirby v. Illinois*, 406 U.S. 682 (1972) for the proposition that Respondent's right to counsel in the context of the facts of this case attaches only after indictment ignores the fundamental distinction between the facts of Respondent's case and those in *Kirby*. In *Kirby*, a suspect was arrested by police officers. The police conducted a station house identification procedure to determine if the victim could identify him as the robber. At the time of the identification procedure no prosecuting attorney participated, no grand jury was considering formal charges, and no attorney for the prosecution was systematically developing a case against the suspect.

The facts of Respondent's case more closely resemble those of *Coleman v. Alabama*, 399 U.S. 1 (1970) than those of *Kirby v. Illinois*, *id.* The Government attorney had a continuing interest in the prosecution of Respondent. Respondent was detained for an indeterminate period as a suspect pending the criminal investigation.

The Petitioner's position that right to appointment of Counsel in a prison setting and under the circumstances of this case be determined solely by the filing of an indictment is to leave the triggering of that right, and its consequent right to a fair trial, totally in the hands of the prosecution, without regard to the fact that it has in

reality committed itself to prosecute. It is apparent that the Government intended to prosecute. The theoretical possibility that it might not may be sound analysis where a person is not subject to the indeterminent curtailment of liberty, see *Hoffa v. United States*, 385 U.S. 293, 310 (1966); and, *United States v. McDonald*, 456 U.S. 1 (1982), but it should not apply where a defendant is held in an indeterminate segregation status amounting to the functional equivalent of arrest and accusation.

The Ninth Circuit opinion is consistent with the concept of effective representation of counsel. At the same time, the Ninth Circuit's opinion is nevertheless narrow in scope. It requires a number of pre-conditions to exist before the right to appointed counsel attaches. The inmate must be in isolation from the prison population; he must be in isolation beyond a ninety (90) day period; he must be detained in isolation at least in part due to a felony investigation or for criminal trial; and he must be indigent. The Government is not obligated to provide counsel if the inmate is not indigent, nor is counsel required if he is in isolation due to purely administrative reasons. Additionally, the inmate in isolation must request the appointment of counsel. The rule provides the flexibility needed to accommodate legitimate administrative concerns, while at the same time assuring the inmate a fair trial.

II. Dismissal Was the Appropriate Remedy in the Present Case.

This Court, in *United States v. Morrison*, 449 U.S. 361, 365 (1981), stated that the remedy for Sixth Amendment deprivations should be tailored to the circumstances, so as to assure the defendant effective assistance of coun-

sel and a fair trial. The Court in *United States v. Morrison, supra*, did not find adverse effect on the right to effective assistance of counsel by the mere fact that Drug Enforcement Agency agents attempted to solicit the defendant's cooperation without the presence of her attorney. In the present case, however, the Ninth Circuit recognized that Respondent's isolation without assistance of counsel handicapped Respondent's ability to defend himself at trial. (Pet. App. 23a)

The Ninth Circuit further recognized that:

"Prison crimes present suspects with unique investigatory and evidentiary obstacles. And, to repeat, the passage of time greatly exacerbates these difficulties. The length of the delay in appointing counsel for appellants who were likewise denied the opportunity to take measures to preserve their own defense means that the critical initial stage of investigation was forever lost to appellants." (Pet. App. 20a)

The prejudice suffered by the inability to locate inmate witnesses (whose names are not known); the inability to produce witnesses whose recollection of events are preserved by written statements; and the loss of witnesses due to death, are not within the class of prejudice that can be cured by a cautionary instruction to a jury, or by suppressing the introduction of Government evidence. The prejudice pervades the entire trial.

The dissenting opinion's contention, adopted by Petitioner, that "the likelihood of exonerating testimony from absent witnesses is preeminently a factual matter for the jury's determination . . ." (Pet. App. 28a-29a), fails to recognize the impossibility of introducing into evidence the expected testimony of a dead witness who has never

either testified or been interviewed. At the district court level such exonerating testimony from Michael Thompson, a deceased witness, was rejected by the trial court. An admission by Michael Thompson that he, along with Steven Kinard and Willard Taylor, had killed Thomas Trejo was rejected as untrustworthy hearsay. (Tr. 2096-2111)

The dissent's remedies fail to deal with the basic issue of fairness. It excuses indeterminate detention, unjustified delay by the Government (and the real advantage it thereby gained), and suggests that competent and vigorous counsel could not have assisted in the preservation of a defense if appointed some thirteen months earlier. The dissent also equates effective assistance of counsel with technically competent counsel. It fails to recognize, as this court recognized in *Powell v. Alabama*, 287 U.S. 45 (1932); *Escobedo v. Illinois*, 378 U.S. 478, 487-488 (1964); and, *United States v. Marion*, 404 U.S. 307, 327 (1971); that appointment of counsel to one accused must come at a point in time where counsel can be effective. The most competent of counsel can not raise the dead, restore lost memories, or locate those whose names are no longer known or capable of being known.

The Ninth Circuit majority recognized the particular need of an indigent inmate who has been isolated pending a criminal investigation for the appointment of counsel. It recognized that the defense had been permanently handicapped by the long delay and the concurrent failure to appoint counsel. Unlike the facts present in *United States v. Morrison*, *supra*, respondents were prejudiced by the absence of counsel at a critical stage in the proceeding. The result reached by the Ninth Circuit was warranted under the facts of the case.

CONCLUSION

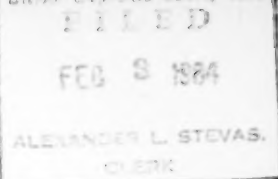
Based on the foregoing, the respondent Adolpho Reynoso urges that the Government's Petition be denied.

Respectfully submitted,

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No. 83-128



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM GOUVEIA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT PHILIP SEGURA

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ISSUES PRESENTED

1. Whether the Sixth Amendment requires appointment of counsel before indictment for an indigent prison inmate who is in administrative detention while under criminal investigation for a serious crime committed in prison.

2. Whether there was warranted a presumption of prejudice or showing of an actual prejudice or threat of prejudice to warrant dismissal of the indictment as the appropriate remedy for the deprivation of the Sixth Amendment right to counsel to such a prison inmate?

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STATEMENT

A. Facts Of The Case

On November 11, 1978, an inmate named Thomas Trejo was stabbed to death in a cell at the Federal Correctional Institution of Lompoc, California. The death resulted from 45 separate stab wounds inflicted on his body with two different instruments. (R.T. 149-154)¹.

According to the testimony of an inmate named Steven Kinard, who had originally been named as a co-conspirator to this murder, but who agreed to testify for the Government in exchange for a plea bargain to a reduced charge (which was later dismissed), Respondent Segura, along with Adolpho Reynoso, Robert Ramirez, William Gouveia and numerous other Mexican inmates, planned the murder of Thomas Trejo for several days prior to its perpetration. According to this same inmate's testimony, following the death of Thomas Trejo, the same defendants and conspirators discussed the details concerning how they had accomplished the murder of Thomas Trejo. Mr. Kinard further testified that he was asked by Defendant William Gouveia and another inmate named Willard Taylor to dispose of the murder weapons which had been used to kill Thomas Trejo and that he did in fact cooperate with these individuals to dispose of the weapons. (R.T. 531-562)

The Government also produced the testimony at the second trial of an inmate by the name of Gene Newby, who testified that, just following the time Mr. Trejo was murdered at the Federal Correctional Institution at Lompoc, Newby was in a cell with other prisoners when a

¹ R.T. refers to the Reporter's Transcript of the trial from which the appeal of the judgment of conviction was taken.

conversation ensued between those other prisoners and the defendants on trial. Newby testified that the defendants acknowledged they had killed Thomas Trejo and then they began disposing of the clothing they had worn during the murder, which has been stained with blood. (R.T. 1007-1031, 2433-2469)

The Government also produced at trial expert testimony that a shoeprint found on a locker in the cell where Mr. Trejo was murdered appeared similar in size, design and degree of wear to the shoe worn by appellant Segura several weeks after the murder. (R.T. 404-428) In addition, fingerprint identification on a sheet of paper at the murder scene established that the fingerprints of appellant Segura and defendant William Gouveia were on the sheet of paper. (R.T. 440-449)²

Each of the defendants in both trials offered the defense of alibi to the charges against them.³ In defense of Respondent Segura, he produced evidence both through himself and other witnesses that on the morning of the murder, prior to its alleged commission, he was busy playing handball in the prison recreation yard. (R.T. 1609-1612, 1594-1597) At the same time, inmate Kinard had testified that Segura and others were walking the prison track planning the murder of Thomas Trejo. (R.T. 509-513) During the critical hour that the murder was actually committed, Respondent Segura produced evidence that he was in the dormitory unit of the prison where he resided, which was a different unit from the one in which Mr. Trejo was murdered, watching a football

² No effort is made herein to specifically outline the proof offered by the Government against Respondent Segura's co-defendants, Reynoso, Ramirez and Gouveia.

³ See Joint Appendix, (p. 42)

game with other inmates. This testimony also showed that Respondent Segura remained continuously in his own unit until well after the murder of Thomas Trejo had occurred. (R.T. 1566-1570, 1577-1583, 1762-1771, 2147-2150)

With respect to the shoeprint found in the murder cell locker, Respondent Segura testified and produced further evidence that he arrived at Lompoc just two weeks before the murder and thereafter developed a foot problem and was issued a pair of Hushpuppy shoes, which were different from the prison issue shoes which were found imprinted on the locker where Trejo was found. (R.T. 2152-2153) The person who brought him the Hushpuppy shoes to wear from the prison supply section corroborated this as did the medical records of Respondent Segura from his prison file at the Federal Correctional Institution at Lompoc. (R.T. 1769, 2152)

With respect to the fingerprint on the sheet of paper in the cell where Thomas Trejo was found murdered, Respondent Segura offered testimony that in the immediate past (the last two weeks before the murder) he had been a resident of that unit where Mr. Trejo's body was found and that Segura had from time to time utilized stationery and touched various pieces of stationery located within the unit. (R.T. 2141)

In addition to the defenses of alibi offered by each of the defendants, several witnesses called by the defense testified that inmate Steven Kinard had told them, in the interval between the two trials of this case, that he (Kinard) and another inmate whose name was Michael Thompson had actually murdered Trejo. (R.T. 1883, 2061, 2209, 2554)

In addition, the defense offered the testimony of an expert in the science of hair examination, from the FBI Laboratory in Washington, who testified that, at the time of the death of Thomas Trejo, numerous Caucasian hairs were discovered on the garments worn by the decedent and the blanket which was covering his body. Numerous Mexican-type hairs, which could have matched appellant's Segura's or the other defendants, were found in the same locations, but none of them matched any of the defendants who were charged with the murder. (R.T. 1389-1407) The inmate named Michael Thompson, who died just prior to the indictment being returned in this case, was a blond Caucasian.

B. Investigative History Of The Case

Since the issue before this Court involves claims of prejudice resulting from the pre-indictment failure to appoint counsel for Respondent Segura and others, the Court will benefit from a detailed investigative history to better appreciate the lack of necessity for the twenty months that passed between the murder and the indictment.

1. On October 20, 1978, Respondent Segura arrived at Lompoc Federal Correctional Institution to serve a sentence for bank robbery. (R.T. 2137) (Joint Appendix, page 31)

2. On November 11, 1978, inmate Thomas Trejo was murdered at the Federal Correctional Institution at Lompoc, California.

3. Between November 11, 1978 and December 4, 1978, the authorities interviewed numerous inmates in an attempt to find out who perpetrated the murder of Thomas Trejo. During this time, one inmate, who did not testify at either of the two trials of this case, implicated

Respondent Segura as a perpetrator of the crime. (Joint Appendix, pp. 50-52)

4. On December 4, 1978, Respondent Segura was placed in the Isolation Unit at Lompoc Federal Correctional Institution for the commission of the murder of Thomas Trejo. At that time, a pair of prison workshoes being worn by Segura was taken from him for analysis and comparison to a shoeprint found on a locker in the cell where inmate Trejo was murdered. (R.T. 397-399) In addition, his fingerprints were at that time, and at all times prior and subsequent to that, available for analysis. (Joint Appendix, pp. 29-31) He remained in isolation until the Indictment in this case on June 17, 1980. (Joint Appendix, page 31)

5. On December 13, 1978, the Prison Disciplinary Hearing involving Respondent Segura's alleged involvement in the murder of Thomas Trejo was held and concluded. Segura requested an attorney to represent him at this hearing and to assist him in proving his innocence. That request was denied. Respondent Segura was then and on that date found guilty of the murder of Thomas Trejo by the Prison Disciplinary Board. (Joint Appendix, p. 38)

6. On March 22, 1979, the laboratory of the Federal Bureau of Investigation in Washington, D.C. conducted a fingerprint analysis attempting to match Respondent Segura's fingerprints to articles found in the murder cell where Thomas Trejo was murdered. (R.T. 472)

7. On April 10, 1979, the analysis of the footprint taken at the scene of the murder on November 11, 1978 and from Segura's shoe taken December 4, 1978 was conducted at the FBI laboratory in Washington. (R.T. 434)

8. On October 16, 1979, additional fingerprint analyses were conducted at the FBI laboratory in Washington. (R.T. 472)

9. On November 1, 1979, Respondent Segura was brought to the Federal Grand Jury in Los Angeles for the purpose of giving additional fingerprint exemplars to be used by the FBI laboratory in Washington to conduct additional fingerprint analysis. (R.T. Vol. B, 19-20)

10. In January, 1980, additional fingerprint analysis was conducted with the submitted fingerprints taken from Mr. Segura at the Grand Jury in November, 1979. (R.T. 472)

11. On June 17, 1980, the Indictment against Respondent Segura and the other co-defendants was returned by the Federal Grand Jury for the Central District of California (Joint Appendix, p. 4)

12. On September 9, 1980, the Government's chief witness against Respondent Segura, Steven Kinard, who himself was a co-defendant in the Indictment for conspiracy to commit murder, volunteered his services to the Government as a witness against his co-defendants in exchange for a plea to a reduced charge. (R.T. 740-743)

13. In January, 1981, after the first trial had resulted in a mistrial, Gene Newby, another critical witness against appellant Segura, was recruited as a witness for the United States in the retrial of appellant Segura and his co-defendants. (R.T. 1075-1079)

14. In April, 1979, an inmate by the name of Robert Carillo died of natural causes. Not knowing of Carillo's death until just prior to the first trial, Carillo was listed as an alibi witness by respondent Segura in the Notice of Alibi given prior to the first trial. (Joint Appendix, pp. 42-43, 78) Segura later testified that Carillo was one of the

inmates with whom he ate morning breakfast on the day of the Trejo killing at the very time that Steven Kinard testified that Segura and his co-conspirators were arranging for the murder of Trejo while walking the athletic track of the prison. (R.T. 2145-2146)

15. In June, 1979, Michael "Flappers" Thompson, another inmate at the Lompoc Federal Correctional Institution, died of natural causes. (R.T. 2228) The evidence at trial, through the testimony of numerous witnesses, showed that Thompson was one of the potential perpetrators of the murder of Thomas Trejo, along with Steven Kinard.

16. Gary Lowe, another inmate at the Lompoc Federal Correctional Institution, was also listed by Respondent Segura as one of the alibi witnesses who was present with Segura in his unit during the time of the Trejo killing. Inmate Gary Lowe died in January, 1980 of natural causes. (Joint Appendix, pp. 42-4,3, 78)

C. Procedural History Of The Case

Prior to the commencement of the first trial, Respondent Segura and co-respondents filed a motion to dismiss the indictment on multiple grounds. The motion was premised upon the prejudicial effects of the lengthy 20-month delay from the time the murder was committed until the defendants were indicted and appointed counsel. The motion was founded upon the right of a defendant to due process of law under the Fifth Amendment and to be free from a prejudicial pre-indictment delay. It was also founded upon the deprivation of rights under the Sixth Amendment to counsel and to a speedy trial.

With respect to the Sixth Amendment violation and the other resulting prejudices highlighted in the Fifth Amendment deprivations, Respondent Segura pointed

out that the tardy appointment of counsel some 20 months after the offense in question rendered it virtually impossible to properly investigate the underlying facts of the case and mount a proper defense. (Joint Appendix, pp. 39-43, 78) Among the allegations listed in the motion was the inability to locate witnesses, some of whom were no longer alive and many of whom were disbursed throughout the prison system or had already been released from prison. The difficulties as presented were made more severe by the fact that most prison inmates know each other only by nicknames and once dispersed are impossible to locate. In addition, the lengthy time between the offense and the appointment of counsel resulted in a finding by counsel that even for those inmates who could be located as witnesses, their memories were severely dimmed as to the relevant facts of the case.

The motion also highlighted that the defendants were hampered in their own ability to investigate the case and hence assist the later appointed counsel because the defendants themselves were in an isolated status for some 20 months and had no access to the general prison population from which population would come the potential witnesses in their case. Thus, respondent and his co-defendants lacked the ability to conduct their own personal investigation, find potential witnesses as to their whereabouts at the time of the offense or to attempt to locate other persons who might have been responsible for the death of Thomas Trejo.

The District Court denied the motion and Respondent Segura and his co-defendants proceeded to trial. The first trial (which lasted approximately 4 weeks) resulted in a mistrial when the jury was unable to reach a verdict. At a re-trial of the case, a second jury returned verdicts of guilty against Respondent Segura and his co-defendants

for the murder of Thomas Trejo and for conspiracy to commit that murder.

In appealing the conviction, Respondent Segura raised numerous issues before the United States Court of Appeal for the Ninth Circuit. Among those were the issues raised in the motion to dismiss the indictment referred to above. In addition, appellant Segura raised issues relating to the failure of the government to disclose an alibi rebuttal witness which it called for testimony in the second trial. Other objections relating to evidentiary rulings at trial were raised in the appeal before the Ninth Circuit.

After the submission of briefs and oral argument on all of these issues, the Court of Appeal, on its own motion, ordered an *En Banc* hearing on the limited issue of the applicability of the Sixth Amendment right to counsel to prison inmates who are held in isolation for lengthy periods of time prior to being indicted for a criminal offense. At the time this *En Banc* hearing was ordered the case of *United States v. Mills and Pierce* was consolidated for consideration of this issue only.⁴

The Ninth Circuit Court of Appeal, in an opinion reported at 704 F.2d 1116, reversed the convictions of Respondent Segura and his co-defendants as well as those of Mills and Pierce on the grounds that there had been a prejudicial denial of the Sixth Amendment right to counsel for all of these prison inmates who had been held in isolation without counsel or the ability to investigate their case prior to indictment. The Court of Appeal analyzed the history of the applicability of the right to counsel as it had been set forth by the United States Supreme Court

⁴ Issues pertaining to pre-indictment delay and other appellate issues were never decided by the Ninth Circuit.

and concluded that in prison crimes the right to counsel should attach to an inmate held in isolation for a period in excess of 90 days, because such an inmate was invariably being held in that category for purposes of future indictment for a criminal offense. In analyzing the remedies available for such a deprivation of a constitutional right as this, the Court concluded that the only potential remedy was that of dismissal of the indictment, since the prejudice resulting from the failure to provide counsel to such an inmate was pervasive.

Subsequently, the United States petitioned this Court for a writ of certiorari, which on October 17, 1983, was granted.

SUMMARY OF ARGUMENT

The Court of Appeal held that an indigent prisoner held in administrative detention past ninety (90) days must be appointed counsel on request, or a subsequent indictment against him for a prison crime was subject to dismissal.

As more fully set forth below, the decision of the Court of Appeal was a logical extension of the teaching of the Supreme Court in its application of the rules pertaining to the Sixth Amendment right to counsel. Moreover, the remedy of dismissal of the instant indictment was the only practical remedy in view of the prejudices suffered by Respondent Segura and his co-Respondents.

ARGUMENT

A. The Ninth Circuit Court Of Appeal's Decision Requiring That Counsel Be Appointed For An Indigent Prison Inmate Who Has Been Held Beyond The Maximum Administrative Detention Period Pending Investigation Or Trial For A Criminal Act Is A Natural Extension Of This Court's Teachings.

This case presents this Court with an opportunity to examine the application of the right to counsel under the Sixth Amendment of the Constitution in the context of the prison setting. The Court of Appeal, faced with a question of first impression unique to prison crimes, fashioned a rule of accommodation which will protect the government's legitimate prison security interests and yet preserve the indigent inmate's Constitutional right to counsel.

The Court of Appeal concluded that inmates, held in administrative detention beyond the ninety (90) day maximum disciplinary period, must ask for an attorney, establish indigency, and then be allowed to make a prima facie showing that their continued presence in isolation is due, at least in part, to a pending investigation for a felony. If the inmate can carry the burden and establish the aforementioned requirements, then prison officials must refute the inmate's showing by demonstrating that continued isolation is necessary for security reasons, appoint counsel, or release the inmate back into the general prison population. 704 F.2d at 1124. The rule fashioned by the Court of Appeal assures that any continued detention is for investigative purposes only and thus fixes a point in time when the initiation of adversary judicial proceedings attaches in the prison context.

1. The Institution Of Adversary Judicial Proceedings In The Prison Setting Occurs When An Inmate Is Isolated Solely For Investigation For A Felony Or Trial For A Criminal Act.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." Historically, the Sixth Amendment counsel guarantee has been given an expansive reading.

"The Court consistently has applied a historical interpretation of the guarantee, and has expanded the constitutional right to counsel only when *new contexts* appear presenting the same dangers that gave birth initially to the right itself." *United States v. Ash*, 413 U.S. 300, 311 (1973) (emphasis added).

In its opening brief for Petitioner, the Solicitor General claims that the opinion of the Court of Appeal is a "radical departure from the decisions of this Court." In asserting this view, the Solicitor General has ignored the historical development and expansive reading given the right to counsel guarantee, and has erroneously asserted a position that would stifle a defendant's right to counsel "whenever necessary to assure a meaningful defense." *United States v. Wade*, 388 U.S. 218, 225 (1966). In order to apply the Sixth Amendment as it was intended by the original drafters, one must examine the circumstances raising the issue in light of the Sixth Amendment's historical development.

"The right to counsel in Anglo-American law has a right historical heritage, and this Court has regularly drawn on that history in construing the counsel guarantee of the Sixth Amendment." *United States v. Ash*, 413 U.S. at 306.

Under the common law of England, which was brought to the American colonies, the typical criminal prosecution

was conducted by a private prosecutor. The American judicial system, in apparent response to the lack of lawyers, adopted the institution of the public prosecutor. As a result "the accused in the colonies faced a government official whose specific function it was to prosecute, and who was incomparably more familiar than the accused with the problems of procedure, the idiosyncracies of juries, and . . . the personnel of the court." *United States v. Ash*, 413 U.S. at 308 (citation omitted). In recognition of this prosecutorial force, which created an imbalance in the adversary system, the American judicial system developed and recognized the accused's right to counsel.

Throughout the years, this Court has maintained a flexible approach when applying the Sixth Amendment's right to counsel guarantee, in order to compensate for the imbalance in the adversary system resulting from the creation of the office of the public prosecutor. Each pre-trial confrontation has been individually examined in light of the purpose for which the Amendment was passed. The Court in *United States v. Ash*, 413 U.S. 300, 310-11 (1973), noted the progressive nature of the right to counsel and the need to avoid the application of a static interpretation of this essential right. The court wrote:

"This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both. In *Wade*, the Court explained the process of

expanding the counsel guarantee to these confrontations:

“ ‘When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today’s law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to ‘critical’ stages of the proceedings 388 U.S., at 224, 87 S.Ct., at 1931 (footnote omitted).’ ”

This case presents a variation on the normal course of criminal proceedings, because the confrontation between the prosecutorial forces and the defendants, all of whom were inmates held in isolation, occurred before defendants had been indicted. The Solicitor General cites *Kirby v. Illinois*, 406 U.S. 682 (1972), in support of its argument that no right to counsel attaches until the initiation of adversary judicial proceedings, a point which the Solicitor General identifies as the time of indictment. However, neither *Kirby*, nor any of the cases cited therein, dealt with the confinement of a prisoner and when his right to counsel should attach. The initiation of the adversary judicial proceeding as envisioned in *Kirby* was determined to be the point in time when the right to counsel should attach to *free* citizens in order to adequately protect their constitutional rights. The opinion in *Kirby* was not designed with the prison environment in mind and thus cannot be mechanically applied to such a situation without some modification.

Different evaluations must be conducted when our attention is drawn to the prison setting and the Constitutional rights of inmates. The Court in *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974), recognized the very different circumstances confronting prisoners and concluded:

"... [O]ne cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison."

In keeping with the continuing evolution of the Sixth Amendment, the Court of Appeals, in the instant case, faced with a unique pre-trial confrontation involving prisoner's rights to counsel, fashioned a rule based upon the prison regulations which would once again restore the balance in the adversary system.

Although, in the vast majority of cases, arrest or indictment do in fact mark the initiation of adversary proceedings, and are not "a mere formalism," *Kirby v. Illinois*, 406 U.S. at 689, that triggers the application of the Sixth Amendment rights, the Court of Appeal noted the unique position vis-a-vis the prosecution, which faces an inmate who is suspected of a prison crime.

"Formal charges need not be brought until the government is ready for trial because the suspect can be isolated without being arrested. To insist that an inmate is not 'accused' until formal charges are initiated is to ignore reality." 704 F.2d 1122.

It is important to note that the *Kirby* plurality, which the Solicitor General relies upon in asserting his position that isolation pending trial can never be an accusation, identified the initiation of judicial proceedings as the point when the government has committed itself to prose-

cute, and the adverse positions of the parties have solidified. "It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby, supra*, 406 U.S. at 689. Thus, if the adverse positions of the parties have solidified at some point earlier than arrest or indictment and the defendant has been faced with the prosecutorial forces of the government, then *Kirby* certainly suggests that the right to counsel attaches at that time, despite the absence of any formal procedures. The *Kirby* plurality opinion can thus be read as holding that the right to counsel attaches at a point in time *no later than* the initiation of adversary judicial proceedings.⁵

Giving the *Kirby* decision this flexible reading rather than the rigid, unbending reading expressed by the Solicitor General will promote the purpose for which the Sixth Amendment was passed and provide a basis for future growth and adaptability. In order to determine whether the right to counsel attaches to a particular event, there must be an "examination of the event[s] in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *United States v. Ash*, 413 U.S. 300, 313 (1973). Given the complexities of each new confrontation between the government and the accused, and the constant need to maintain a balance in the adversarial system, it would be a misguided endeavor to engrave in stone any rules for the application of the right to counsel.

⁵ Justice Brennan, Marshall and Douglas, who joined in dissenting, would have attached the right to counsel at an even earlier stage.

In *United States v. Wade*, 388 U.S. 218, 224 (1967), this court remarked:

"[O]ur cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings. . . . The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defense.' ". . . the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." (footnote omitted).

The initial stages of investigation in the present case were such a 'critical stage' of the proceedings, and counsel's absence did in fact derogate from the accused's right to a fair trial. Respondent Segura and his three co-defendants were placed in solitary confinement for almost two years without the assistance of counsel, despite repeated requests, while the government and F.B.I. slowly and methodically conducted their investigation and prepared their case for trial. It was during these early months that witnesses' memories were most distinct. It was in this period that the Government interviewed hundreds of inmates and found those it would use to later (much later) seek an indictment. The defendants were completely deprived, by virtue of their isolation from the general prison population and the absence of legal assistance, to conduct a similar investigation. During the first months of solitary confinement, prison officials conducted a disciplinary hearing at which time respondent was found guilty of the murder of Thomas Trejo. As a result of this prison hearing, respondent was sentenced to solitary confinement pending the Government's investigation.

Federal prison regulations provide, as the Court of Appeal noted, that the maximum stay in isolation for

disciplinary purpose is 90 days. C.F.R. § 541.11 (1982); 704 F.2d 1124. "Federal prison regulations [also] specify that administrative detention can only continue indefinitely where the detention is in contemplation of a criminal prosecution." *Id.* And finally, the prison regulations require the Warden to "prepare a memorandum detailing the reasons for placing an inmate in administrative detention, with a copy given to the inmate." 28 C.F.R. § 541.20(b). Yet despite these detailed procedures, prison authorities continued the solitary confinement of respondent and his co-defendants for seventeen (17) months beyond the maximum three-month disciplinary period, and failed to prepare or provide respondent with a memorandum stating the reasons for his continued confinement. This clearly suggests that the seventeen (17) months of confinement beyond the ninety (90) day maximum disciplinary period was in contemplation of criminal prosecution, which was presumed by the Court of Appeal and never refuted. The attempt now made by the Solicitor General to utilize these prison regulations as a justification for the lengthy isolation of these defendants is misleading in that none of the aforementioned procedures for lengthening the isolation was employed, and no proper ground existed for lengthening the isolation. The purpose and only purpose for keeping these inmates in isolation was to keep them from the general prison population where these inmates could potentially suborn perjury concerning the crime in question. See Petitioner's Brief, pp. 26-27. Thus, under the guise of preventing subornation of perjury, the Government in effect has justified depriving an inmate of any right to investigate the case on his own.

Since respondent had been found guilty of the murder by prison authorities and was suffering a significant loss of his liberties and the ability to investigate his own case

due to his lengthy confinement pending criminal investigation, it is clear that the adverse positions of the parties had solidified, the initiation of the adversary proceedings had begun and the right to counsel had attached all prior to the formal indictment.

2. The Respondent Was Denied The Effective Assistance Of Counsel At A "Critical" Pretrial Proceeding.

This court has consistently held that the right to counsel attaches at any "critical" pretrial proceeding. *United States v. Wade*, *supra*, 388 U.S. at 224. A "critical" stage of the proceeding occurs whenever counsel's presence is necessary "to protect the fairness of the trial itself." *Schneckloth v. Bustamonte*, 412 U.S. 218, 239 (1973); *Cf.*, *Coleman v. Alabama*, 399 U.S. 1, 17-18 (1970), (Stewart, J., dissenting). As noted by the Court of Appeal, respondents clearly lacked a meaningful defense at trial as a result of being denied the aid of counsel for nearly two years. While the government and F.B.I. gathered testimony and preserved evidence, Respondent was forced to sit in solitary confinement without the aid of counsel.⁶ Twenty months later the Government lethargically completed its thorough investigation and indicted Respondent. Only then was Respondent appointed counsel. However, at this point, the "critical" initial stages of investigation were forever lost to Respondents. Memor-

⁶ It must be noted that a non-indigent inmate placed in solitary confinement is permitted to hire counsel at the initial stages of the government's investigation in order to preserve his right to a fair trial. Respondent's lack of effective assistance of counsel and his resultant unfair trial were due solely to his indigency.

Further, an indigent inmate held in disciplinary segregation has no opportunity whatsoever to gather or preserve evidence once the disciplinary proceedings are concluded and his need for counsel truly becomes apparent.

ies had faded, witnesses were lost or had died and physical evidence essential to respondent's case had deteriorated. (See Appendix A, pages 79-82)

Although the Court in *United States v. Ash*, 413 U.S. 300 (1973), concluded that the right to counsel does not necessarily apply to the prosecutor's trial preparation interviews with witnesses or to photographic displays, it based this holding on the existence of the following parity:

"The traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself.

"That adversary mechanism remains as effective for a photographic display as for other parts of pretrial interviews. No greater limitations are placed on defense counsel in constructing displays, seeking witnesses, and conducting photographic identifications than those applicable to the prosecution." 413 U.S. at 318 (footnote omitted).

This balance in the adversarial system caused the confrontation in *Ash* to not be "critical." However, if this traditional counterbalance in the American adversary system is upset by the inability of defense counsel to seek and interview witnesses himself, then the pretrial confrontations become "critical." Respondents in the present case lost this equality of access to witnesses by being held in isolation without counsel for twenty (20) months while the government took full advantage of the prejudicial disparity and reduced respondent's trial "to a mere formality." *United States v. Wade*, 388 U.S. at 224.⁷

⁷ The continued reference by the Government to the fact that these defendants and a fifth inmate charged called fourteen (14) alibi witnesses is misleading. These fourteen witnesses were not all called by

There can be little doubt that the presence of counsel could have averted the prejudicial effect of the lengthy detention and assured a meaningful confrontation at trial. "[I]nvestigation and preparation are the keys to effective representation. . . . It is impossible to overemphasize the importance of appropriate investigation to the effective and fair administration of criminal justice." ABA Standards at 225. See ABA Standards § 4.1 (2d ed. § 4-4.1) (Duty to Investigate) By denying respondents the appointment of counsel at the critical initial stages of investigation, the government has violated the very essence of the Sixth Amendment guarantee.

Proper investigation by both sides is crucial in maintaining the balance of the adversary system.

"First, the proper functioning of our adversary system demands that both sides prepare and organize their case in advance of trial. There can be no justice where one party to the battle [is prevented from] arm[ing] itself with the pertinent facts and law. Second, in a very practical sense, cases are won on the facts. Proper investigation is critical not only in turning up leads and witnesses favorable to the defense, but in allowing counsel to take full advantage of trial tactics such as cross-examination and impeachment of adverse witnesses. And of course, adequate legal investigation is necessary to ensure that all available defenses are raised and the government is, put to its proof." *United States v. Decoster*, 624 F.2d 196, 277-78 (D.C. Cir. 1976) (Bazelon, J., dissenting) (footnotes omitted).

one defendant, but divided among them. Moreover, in the pretrial and trial proceedings, counsel proved that there were other alibi witnesses who could not be called because they were known only by nicknames, had dispersed to other prisons or been released from custody, or had died. Also lost through natural death was an alternate suspect, Michael Thompson.

The Court of Appeal held that respondent's lack of counsel during the "critical" initial stages of investigation unconstitutionally obstructed the ability of respondent to receive a fair trial. Viewed in the light of the historical development of the Sixth Amendment, and this Court's previous decisions, the Court of Appeal's decision is a logical extension of the counsel guarantee and should be upheld.

3. The Decision Below Is A Logical Extension Of The Right To Counsel Guarantee And Protects Indigent Inmates In An Area Previously Subject To Overreaching By The Prosecution.

The Court of Appeal held that if an inmate is confined in isolation for more than 90 days, the maximum disciplinary period provided for in the prison regulations in the absence of properly sought extensions, he should be permitted to demonstrate, and in fact it is presumed, that his continued presence in isolation is due to a pending investigation or trial for a criminal act. *United States v. Gouveia*, 704 F.2d 1116, 1124 (9th Cir. 1983). In order to avoid the potential for abuse which may arise by extending the right to counsel to such indigent inmate detainees, and in recognition of the prison's legitimate need to protect the security of the institution and its inmates, the Court of Appeal delineated specific procedures which must be met before an indigent inmate is constitutionally entitled to appointed counsel. The Court held:

"The inmate must ask for an attorney, establish indigency, and make a prima facie showing that one of the reasons for continued detention is the investigation of a felony. At this point prison officials must either refute the inmate's showing, appoint counsel, or release the inmate back into the general prison population." *Id.*

By couching its holding in the aforementioned terms, the Court of Appeal has permitted the continued detention of an inmate for legitimate prison disciplinary reasons, thus safe-guarding the integrity of the internal prison system, and yet recognized the indigent inmate's constitutional right to counsel when he has for all practical purposes been charged with a federal crime.

Prior to the decision of the Court of Appeal, the Government, faced with circumstances such as those in the instant case, would actually assume the role of an adversary vis-a-vis the prisoner, without having to comply with the constitutional procedures which follow when that adversarial role is formalized by an indictment or information. Thus, in effect, the Government can functionally accuse in the prison context and then delay the attachment of the prisoner's constitutional rights indefinitely while it builds its case.* As the Court below noted, "when detention is ordered as a disciplinary measure or to prevent disorder it is indeed a matter of internal prison administration. But when used to isolate an inmate pending trial both its purpose and effect is accusatory." 704 F.2d at 1123. In light of this observation, the Court of Appeal fashioned a rule to give effect to the right to counsel in the prison context, in order to avoid clear overreaching when committed by the Government, as in the instant case.

The reasoning of the Court of Appeal is consistent with the historical development of the Sixth Amendment and

*The Court should be mindful that in murder prosecutions, the accused is without the added protection of a statute of limitations. See 18 U.S.C. § 3281. Thus, if a detainee is left without protection such as that called for by the Court of Appeal, he could be without counsel for years prior to indictment.

with the decisions of other Courts who have examined the application of the Sixth Amendment in the prison context.

In *United States v. Duke*, 527 F.2d 386 (5th Cir. 1976), the defendant inmate was held in administrative segregation for 35 days. The Court examined this detention period under traditional Sixth Amendment right to speedy trial analysis, and concluded that the Sixth Amendment was not triggered because administrative segregation was "[u]sed as a method of disciplining or investigating inmates who break prison regulations, of protecting certain inmates from members of the general population, and of providing a general cooling-down period for inmates involved in events that could disrupt the general population" *Id.* at 390. However, the Court noted that this conclusion was based on the fact that ". . . administrative segregation accompanying the breach of a prison regulation [was] in no way related to or dependent on prosecution by the Federal Government of an inmate for that same offense as a violation of federal criminal law." *Id.*

Thus, when the administrative segregation goes beyond serving a purely internal disciplinary function and is used for reasons related to or dependent upon prosecution by the Federal Government, the segregation is tantamount to an accusation. *See also United States v. McLemore*, 447 F. Supp. 1229, 1235-36 (E.D. Mich. 1978) (Sixth Amendment right to speedy trial triggered by placement in administrative detention since purpose of detention was to answer for criminal charges and not for purely institutional reasons). Consistent with these decisions, the Court below fashioned a rule which provided an indigent inmate with the opportunity to demonstrate that his continued detention is related to or dependent on a pending criminal prosecution.

As noted previously, an interpretation of the Sixth Amendment cannot be engraved in stone. The right to counsel guarantee must be expanded to those situations which "appear presenting the same dangers that gave birth initially to the right itself." *United States v. Ash*, 413 U.S. at 311. The Court below noted the potential for overreaching by the prosecution in a lengthy detention, thus creating an imbalance in the adversary system. To remedy this imbalance, the Court of Appeal extended the right to counsel under limited circumstances, and brought the adversary system into a constitutional balance.

B. Dismissal Of The Indictment Is The Appropriate Remedy To Neutralize The Prejudice Suffered By Respondent

The Solicitor General argues that, even assuming there has been a Sixth Amendment violation, dismissal of the indictment is an inappropriate remedy in the absence of any specific showing of prejudice.

The Court of Appeal, in fashioning a remedy commensurate with the deprivation charged, construed the prejudice suffered by respondent in the instant case in light of the recent decision in *United States v. Morrison*, 449 U.S. 361 (1981). In *Morrison* this Court examined the possibility of dismissal in the event of a violation of the Sixth Amendment's right to counsel. This Court adopted the following approach in order to aid in the selection of a proper remedy: "[o]ur approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Id.* at 365. The Court went on to note that if there were demonstrable prejudice or even the substantial threat thereof, then dismissal of the indictment would be appropriate. *Id.*

The Court of Appeal concluded that the instant case presented a compelling set of circumstances which justified the remedy of dismissal. The denial of counsel to respondent during the initial critical stage of investigation, while the events surrounding the murder were fresh in the minds of all those involved, and for the twenty months thereafter, so permanently prejudiced respondent's defense that a fair trial could not be had. "Here, however, Government conduct has rendered counsel's assistance to [respondent's] . . . ineffective and the resulting harm is not capable of after the fact remedy . . . [h]ere . . . the only certain remedy is to dismiss the indictments against them." 704 F.2d 1126.

Keeping in mind the teachings of the Supreme Court, that courts must be "responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective," *United States v. Morrison, supra*, at 364, and in order to neutralize the substantial, permanent prejudice suffered by respondent, the Court below was left with no alternative but to dismiss the indictment.

Contrary to the claims by the Solicitor General that the Court dismissed the indictment based on a presumption of prejudice, the Court of Appeal stated: "Even without the presumption there is evidence that 'substantial prejudice' may have occurred in the instant case." 704 F.2d 1126. The respondents clearly demonstrated for the record the substantial prejudice suffered by them as a result of being denied counsel. Critical alibi witnesses and other crime suspects were lost during the inordinant delay through death or inability to be located. This fact in itself is sufficient to deny respondent a fair trial. A strong showing was made concerning the difficulties faced by counsel first appointed twenty (20) months after the

crime in locating witnesses, most of whom were known only by nicknames, and who had now been either scattered about the prison system or released from custody altogether. Moreover, as noted by the Court below, it was a significant fact that the Government was unable to rebut respondent's showing of potential prejudice. (See Joint App. 79-82)

This Court in *Morrison* noted that under the appropriate circumstances a substantial threat of demonstrable prejudice would warrant dismissal. In addition to making a showing of substantial prejudice, respondent demonstrated a substantial threat of demonstrable prejudice. Had counsel been appointed at the appropriate time, he could have preserved the physical evidence and testimony of witnesses necessary to assure a fair trial. However, under the circumstances of the instant case, the Court noted the potential of substantial prejudice which faces administrative detainees because "ordinarily it will be impossible adequately either to prove or refute its existence." 704 F.2d 1126. This inadequacy stems from the inmate being compelled to prove that his defense has been prejudiced by the irretrievable loss of exculpatory evidence, the very evidence which cannot now be determined due and owing to the lack of attorney assistance to preserve it. Thus, the Court below was correct in dismissing the indictment.

As a result of the foregoing demonstration, it is clear that the scales of justice weigh more heavily in favor of dismissal of the indictment in the instant case.

CONCLUSION

Respondents clearly were prejudiced by the deprivation of the effective assistance of counsel. As a matter of fashioning a remedy in this case, and also for policy

reasons attendant in other cases of serious prison crime, the effort by the Court of Appeal to construct a permanent rule which preserves both the integrity of prison security and the safeguards of the right to counsel under the Sixth Amendment should be sustained by this Court.

For the foregoing reason, the decision of the Court of Appeal should be affirmed.

Respectfully submitted,

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No. 83-128

Office - Supreme Court, U.S.

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GOUVEIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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II

Miscellaneous:

U.S. Dep't of Justice, Federal Prison System, *Institution Supplement* LOM 5270.5 (Jan. 21, 1983)

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-128

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GOUVEIA, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

In our opening brief, we showed that the court of appeals' holding that an indigent inmate who is segregated from the general prison population for more than 90 days pending investigation of a prison crime must either be appointed counsel or returned to the general prison population constitutes a radical departure from this Court's explication of the Sixth Amendment right to counsel. Respondents and amici offer an assortment of rationales in an effort to support the decision below. But they cannot overcome the fact that the Sixth Amendment applies only to "criminal prosecutions" and that no such prosecution was pending prior to their indictments. Furthermore, respondents' briefs make it quite clear that the record cannot support the court of appeals' summary conclusion that the absence of appointed counsel prior to indictment must have deprived them of a fair trial.

1. Respondents Mills and Pierce (Br. 14-19) begin by accusing us of distorting the record in our explanation of the important security considerations that underlie administrative detention of an inmate-suspect

during the time he is under criminal investigation. Amicus American Civil Liberties Union (ACLU) goes further, urging (as the basis for a due process argument) that the government used administrative detention as a tactical weapon to gain an unfair advantage over respondents. See ACLU Br. 16-17, 42-46. Those characterizations are simply wrong.¹

a. Common sense alone requires the conclusion that an inmate whom the FBI suspects of brutally murdering another inmate is likely to constitute a

¹ We note that respondents and amici attempt to color this case by their descriptions of conditions in administrative detention. See, *e.g.*, Reynoso Br. 2-3; Mills Br. 2-3; ACLU Br. 4, 53-54 n.*. Such descriptions are irrelevant to the Sixth Amendment issues raised by this case; at most, they might raise issues under the Fifth or Eighth Amendments. In any event, we note that the descriptions in the briefs are not always consistent with the record or with each other. *E.g.*, compare Mills Br. 2 (respondents were confined to three-by-five foot cells) with Reynoso Br. 2 (respondent was confined to a four-by-six foot cell); compare Gouveia Br. 19 (respondent had no access to a prison library) with Pet. App. 3a (respondents had access to legal materials); compare Reynoso Br. 2 (respondent was permitted only one telephone call per month to be made in the presence of a counselor, guard or case manager) with Pet. App. 3a (respondents could make unmonitored phone calls) and J.A. 62 (affidavit of William Kindig, Supervisor of Administrative Detention Unit at Lompoc) (no limitation on number of telephone calls that may be made by an inmate housed in ADU; when an inmate wishes to speak with an attorney a special attempt is made to make an unmonitored telephone available quickly).

For the Court's information, we are lodging with the Clerk of the Court, and providing to respondents' counsel, copies of LOM 5270.5, dated January 21, 1983, a Lompoc institution supplement on the subject of inmate discipline, which includes information on administrative detention and disciplinary segregation at Lompoc.

threat to the security of the institution and the safety of other inmates and staff if permitted to remain in the general prison population. As we noted in our opening brief (at 27-29), concerns about "investigations" by inmate-suspects in the form of retribution against possible witnesses are not hypothetical, but are confirmed by experience. This Court in *Hewitt v. Helms*, No. 81-638 (Feb. 22, 1983), recognized that administrative detention of an inmate pending a criminal investigation is not an arbitrary measure, but instead serves significant security purposes, including protection of potential witnesses and prevention of subornation of perjury. See slip op. 12, 14-15, 16 n.9.²

² Respondents cite *Hughes v. Rowe*, 449 U.S. 5 (1980), in support of their contention that inmates under criminal investigation may not "presumptively be deemed security risks because of the abstract possibility that they may impede the Government's investigation" (Mills Br. 17). But *Hughes*, which involved an inmate's action against prison officials under 42 U.S.C. (Supp. V) 1983, presented a very different situation from this case. In *Hughes*, the petitioner had been placed in segregation pending investigation by prison officials of his consumption of a homemade alcoholic beverage. There was no pending criminal investigation of petitioner's actions (which amounted only to a violation of prison regulations), and prison officials did not even allege that petitioner had been placed in segregation because of security concerns. Moreover, since petitioner had already admitted his guilt at the time he was placed in segregation, the Court concluded that there was no real likelihood that he would fabricate alibis or intimidate witnesses. 449 U.S. at 13-14 n.12. In contrast to *Hughes*, respondents here were under criminal investigation for the murder of another inmate, and they never admitted their guilt. Thus, the security concerns underlying segregation in this case were far more significant than those in *Hughes*. See also *Hewitt v. Helms*, slip op. 8 (noting that *Hughes* was "essentially a pleading case rather than an exposition of the substantive constitutional issues involved").

As Bureau of Prisons regulations indicate, pendency of a criminal investigation alone would not support administrative detention of an inmate-suspect; prison officials must in addition make a specific finding that the inmate poses a security threat. See 28 C.F.R. 541.22(a). In fact, security is the primary consideration in any decision to keep an inmate in administrative detention.³ Continued administrative detention pending a criminal investigation is used primarily in connection with acts of physical violence, such as murder or assault. An inmate-suspect normally would remain in the general prison population if he were under criminal investigation for, *e.g.*, tax fraud or an offense committed outside of prison. An inmate-suspect who is transferred from the institution where a crime occurred normally would be returned to the general prison population. As respondent Gouveia notes (Br. 2, 16), he was released to the general prison population following his transfer to Leavenworth prison.

Respondents seem to suggest that the government was required to make a factual showing that each respondent remained a security threat throughout the entire period of investigation. But in the case of inmates like respondents, who were suspects in brutal murders of other inmates, the security reasons for continued segregation from the general prison population ordinarily would be so self-evident to any prison official that detailed findings would be regarded as unnecessary.⁴ The Bureau of Prisons

³ The other conditions listed in the regulations (*e.g.*, pendency of an investigation, need for protection from other inmates) serve to confine use of the security rationale to those situations in which administrative detention is needed most.

⁴ Security concerns are particularly obvious in cases like this one, in which officials believe that prison gangs are in-

forms that are in the record of this case indicate that prison authorities made express findings that the inmates suspected of the murders posed serious threats to other inmates and/or to the security of the institution. See, *e.g.*, J.A. 10, 12, 138, 139.⁵ Respondents did not introduce comparable forms relating to the later portions of their administrative detention, but it can be presumed that prison authorities continued to make the findings prescribed by the regulations. See 28 C.F.R. 541.22(a) and (c); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). That presumption is confirmed by forms we have located in Bureau of Prisons files, which indicate that prison officials concluded at 30-day intervals that the original reasons for placement of respondents in administrative detention continued and, in addition, that four respondents were pending transfer while authorities awaited vacancies in the control unit of the federal correctional facility at Marion, Illinois (the highest security level institution in the federal prison system).⁶

volved in a murder. See, *e.g.*, Sept. 16, 1980 Tr. 9-24 (referring to Mexican Mafia affiliations of *Gouveia* respondents); Mills Tr. 562-563 (referring to Aryan Brotherhood connection of respondent Mills). In such cases, rival gangs may engage in retaliation against suspects who remain in the general prison population.

⁵ Respondents object (Mills Br. 15 n.10) that the findings by prison officials were part of a preprinted form. But that concession to administrative convenience and regularity cannot undermine the validity of the findings. The record contains no suggestion that prison officials did not make the prescribed findings for a particular inmate before signing the form.

⁶ Because several respondents have asserted that prison officials did not continue to find them to be security risks dur-

b. Amicus ACLU's contention that the government uses administrative detention of inmate-suspects, combined with preindictment delay, as a tactical weapon to gain an unfair advantage over inmate-suspects is wholly without foundation in the record. Bureau of Prisons records show that prison officials continued to detain respondents on the basis of security concerns associated with the criminal investigations of the murders and the pending transfers of respondents to the Marion Control Unit. See page 5 & note 6, *supra*. The courts below found that the delays in indicting both the *Gouveia* and *Mills* respondents were not motivated by tactical concerns on the part of the government and were at least in part due to the difficulties typically experienced by the government in investigating prison crimes. The district court in the *Gouveia* case concluded (J.A. 92):

I do not * * * find the delay was motivated by an intent to gain a tactical advantage over the defendants, any motivation by the government, and I find no bad faith on the part of the government. It's apparent from the Court's examination of what has occurred that there were a large number of witnesses to be interviewed, and certainly a correctional setting can complicate in many ways such an investigation.

The court of appeals panel that decided the first appeal in the *Mills* case likewise concluded (Pet. App. 38a n.2): "There was no evidence of intentional gov-

ing their detention (see *Segura* Br. 18; *Mills* Br. 3 n.4, 14-15), and because the ACLU suggests that the government continued to hold respondents in administrative detention for tactical reasons, we are lodging with the Court copies of the 30-day review forms we have been able to locate in Bureau of Prisons files. We are providing copies of each respondent's forms to his counsel.

ernment delay. The investigation was ongoing until defendants were indicted." ⁷ As this Court has held, there is no constitutional requirement that prosecutors cease their investigations as soon as they gather the minimum amount of evidence that would

⁷ These findings are fully supported by the record. In both cases the government was required to interview scores of witnesses and to make special arrangements for the safety of inmates who expressed a willingness to cooperate. In the *Gouveia* case Assistant United States Attorney Bert Deixler and FBI agent James Wilkins submitted affidavits explaining the steps taken from the time of the murder in November 1978 to the indictment in June 1980; Deixler provided further explanation during the hearing on the motions to dismiss the indictment. Among the difficulties they outlined were the need to interview over 100 individuals, delays in analyzing the large amount of physical evidence, the discovery in the fall of 1979 that it would be necessary to obtain prints of the sides of respondents' hands and scheduling of grand jury appearances for this purpose, the need to double check the accounts of potential grand jury inmate-witnesses to make sure they were truthful, the need to make arrangements for potential government witnesses to enter the witness protection program, and lack of evidence establishing respondent Segura's participation in the murder until February 1980. See J.A. 50-52 (Wilkins affidavit); C.R. No. 62, at 18-20 (Deixler affidavit); Sept. 8, 1980 Tr. 124-131.

In the *Mills* case Assistant United States Attorney Richard Drooyan and FBI agent Thomas Mansfield submitted affidavits describing the investigation. They explained that from August 1979 (when the murder occurred) to March 1980 (when the indictment was handed down) FBI investigators interviewed over 100 individuals, that the grand jury heard testimony from inmate-witnesses in October and November 1979 and in March 1980, that arrangements had to be made to transfer those witnesses to other prisons for security reasons, that FBI laboratory reports had been received in November and December 1979 and in February 1980, that the FBI report was completed in March 1980 and was over 200 pages long, and that two witnesses did not provide key evidence until March 1980. J.A. 140-146.

support an indictment. Rather, they may, *inter alia*, continue to gather evidence that would support a finding of guilt beyond a reasonable doubt. See, *e.g.*, *United States v. Lovasco*, 431 U.S. 783, 790-795 (1977); *Hoffa v. United States*, 385 U.S. 293, 310 (1966). In the prison setting, investigations are complicated by the additional problem of making security arrangements (often involving transfers to distant institutions) for inmates who indicate a willingness to cooperate if the government will take steps to ensure their safety.*

2. As we explained in our opening brief (at 19-22), this Court has held consistently (and for sound reasons) that the Sixth Amendment right to counsel attaches "only at or after the time that adversary judicial proceedings have been initiated against" a defendant. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (plurality opinion). While respondents and amici do not point to any adversary judicial proceeding that was initiated prior to the indictments in this case, they attempt to characterize respondents' administrative detention in ways that suggest it should trigger

* Assuming *arguendo* that in some cases prison officials might impose administrative detention pending a criminal investigation without a valid reason, an inmate-suspect presumably could apply to a district court for an order returning him to the general prison population. The district court in the *Gouveia* case specifically found that during the time respondents were in administrative detention they had "the right to telephone, write, and the right to file complaints and petitions." Sept. 8, 1980 Tr. 138.

Of course, any claim based on alleged misconduct by the government in segregating an inmate-suspect without a valid reason or delaying an indictment for tactical reasons would be based on the Due Process Clause of the Fifth Amendment, rather than on the Sixth Amendment right to counsel.

the Sixth Amendment right to counsel. These attempts are unsuccessful.

Respondents Mills and Pierce suggest (*e.g.*, Br. 12) that during the time they were in administrative detention, they were being held "to answer impending criminal charges." But despite the similarity in sound, a possible "impending" charge is not the same as an actual "pending" charge. During the time respondents were in administrative detention there were no criminal charges against them and thus nothing for them to "answer".⁹ Of course, it is clear that the pendency of administrative charges at the initial stage of their detention did not entitle respondents to appointment of counsel. See *Baxter v. Palmigiano*, 425 U.S. 308, 314-315 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 569-570 (1974).¹⁰

⁹ Respondents misuse the term "holding to answer," which has a specific meaning in the area of criminal procedure. Fed. R. Crim. P. 5.1(a), which relates to the probable cause finding made by a magistrate, provides that "[i]f from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court." There was, of course, no proceeding in which any of the respondents was "held to answer" by a magistrate prior to the time of the indictments in this case.

¹⁰ Mills and Pierce also suggest (Br. 13 n.7) that arrest alone (as opposed to arrest and holding to answer a criminal charge) is enough to constitute an "accusation" for speedy trial purposes, citing *Dillingham v. United States*, 423 U.S. 64 (1975). See also ACLU Br. 22. But the petitioner in *Dillingham* in fact was held to answer a criminal charge. After his arrest in April 1970 and the filing of a criminal complaint, Dillingham was bound over to the grand jury by a magistrate, who set bail following waiver of a preliminary hearing. In May 1970 Dillingham was released on a \$1,500 bond, and in February 1972 he was indicted with 15 other defendants. See *United States v. Palmer*, 502 F.2d 1233, 1234 (5th Cir. 1974). Because formal criminal charges had been

Amicus ACLU suggests (Br. 14-33) that the Sixth Amendment right to counsel should be triggered by "arrest and significant detention." Of course, segregation from the general prison population for administrative purposes does not constitute an "arrest," and continuation of segregation does not amount to "significant detention" in the case of inmates who otherwise are being "detained" in prison on a long term basis as a result of sentences for previously committed crimes. Like the court of appeals and respondents, the ACLU stresses that outside prison a suspect who is arrested following a crime and brought before a magistrate would be entitled to appointment of counsel. The ACLU suggests that the rules of criminal procedure do not operate in the normal manner in the prison setting, since the government has no need to arrest a suspect who is already in prison. In the ACLU's view, additional constitutional protection is needed so that the government could not delay indefinitely making an accusation, thereby postponing the occasion for appointment of counsel.

The ACLU's reasoning stands the matter on its head by ignoring the reasons why civilian arrestees are charged and obtain the appointment of counsel. Except in cases in which counsel is appointed for a particular judicial proceeding (such as a preliminary hearing), preindictment appointment of counsel is really an indirect consequence of the operation of the Due Process Clause, rather than a result of any policy underlying the Sixth Amendment counsel requirement. A suspect who is not a convicted prisoner may

brought against Dillingham by arrest and filing of a criminal complaint, which remained pending against him, the United States conceded in the Supreme Court that the period between his arrest and indictment should be included in determining whether he had been deprived of his right to a speedy trial. See 74-6738 U.S. Memo. in Opp. at 4-7 (1975 Term).

not have his liberty restricted (either by pretrial incarceration or by bail conditions) except as a result of the pendency of judicial criminal proceedings; to impose such restraints on the basis of nothing more than a criminal investigation would violate the individual's due process liberty rights. The judicial proceedings required by the Due Process Clause in such cases coincidentally trigger appointment of counsel. But if a suspect has already been deprived of his right to liberty by virtue of a prior conviction and sentence of incarceration,¹¹ there is simply no need to arrest him or charge him with a crime before the government and the grand jury have determined that there should be a prosecution.

The ACLU's claim amounts to the contention that prosecutors should have initiated adversary judicial proceedings at an earlier point, so that respondents would have been entitled to appointment of counsel. But "[t]here is no constitutional right to be arrested" in order that the right of counsel may attach earlier than it otherwise would. *Hoffa v. United States*, 385 U.S. at 310. Appointment of counsel is not an end in itself, but rather a right that attaches when other events—i.e., those that accompany the initiation of adversary judicial proceedings—create a special need for counsel. If those events do not take place prior to indictment (as they did not in this case), the Con-

¹¹ This Court has held that an inmate has no constitutionally protected liberty interest in remaining in the general prison population, at least in the absence of mandatory standards governing removal from the general population. See *Hewitt v. Helms*, slip op. 5-11. Nor does an inmate have any liberty interest in avoiding transfer to another institution. See *Olim v. Wakinekona*, No. 81-1581 (Apr. 26, 1983), slip op. 10-11; *Montanye v. Haymes*, 427 U.S. 236, 242 (1976); *Meachum v. Fano*, 427 U.S. 215, 223-225 (1976).

stitution does not require preindictment appointment of counsel.

Respondent Reynoso errs in contending (Br. 23-27) that the government had committed itself to prosecute long before the indictments in these cases. Respondents themselves insist that these were close cases. See, e.g., Mills Br. 4-6. Steven Kinard, the key prosecution witness in the *Gouveia* case, did not agree to testify for the government until the eve of the first trial; even with Kinard's testimony, the first trial resulted in acquittal of co-defendant Flores and a mistrial as to the murder charges against respondents. The government's affidavits indicate that it was still interviewing witnesses and receiving FBI laboratory reports in 1980 (see note 7, *supra*), and that until February 1980 the government did not have evidence that would support indictment of respondent Segura (see J.A. 52; Sept. 8, 1980, Tr. 124-125, 130). In the *Mills* case Assistant United States Attorney Drooyan stated in his affidavit that he did not decide to present the matter to the grand jury for indictment until he had received new evidence from inmates Cook and Medina in March 1980 (J.A. 140-141).¹²

3. In apparent recognition that this Court's precedents do not support their right to counsel claims, re-

¹² Respondents Mills and Pierce (Br. 3) and amicus ACLU (Br. 3-4, 42-43, 45-46) incorrectly state that prison officials invoked a provision of the regulations relating to "pretrial inmates," 28 C.F.R. 541.22(a) (6) (i), as the ground for continuing to hold respondents in administrative detention. The Bureau of Prisons considers "pretrial inmates" to be those who are under indictment and who are awaiting trial (as were the *Gouveia* respondents during the time they were housed in the Los Angeles County Jail, see U.S. Br. 4 n.3). Since respondents were serving sentences for other crimes and had not been indicted on new charges during the time they were in administrative detention at Lompoc, they were not "pretrial inmates."

spondents and amici contend that it is appropriate to disregard some of those precedents in prison cases. See, *e.g.*, Ramirez Br. 18-19; Segura Br. 14-16; Mills Br. 28-38; National Legal Aid and Defender Association (NLADA) Br. 25-36. There is no question that the prison setting has special characteristics and that the scope of respondents' rights must be defined in light of those characteristics. But in general, constitutional rights are more, rather than less, limited in the prison setting. See, *e.g.*, *Hewitt v. Helms*, slip op. 5-7; *Wolff v. McDonnell*, 418 U.S. at 561-563. In any event, the purported distinctions between prison and nonprison settings identified by respondents and amici do not suggest that inmate-suspects should be constitutionally entitled to appointment of counsel at an earlier stage than other suspects.

Respondents object that the failure to appoint counsel during the period an inmate-suspect is in administrative detention gives the government an unfair advantage in investigating and preparing its case and that the government's "head start" in prison cases creates an inequity of constitutional proportions. See, *e.g.*, Gouveia Br. 12-17; Segura Br. 20-21; Ramirez Br. 23. But in many cases, both inside and outside prison, the government has the initial opportunity to investigate and, at least in some instances, to preclude others from investigating for some period of time. For example, government authorities often secure the scene of a crime, with the result that defendants and defense counsel are denied access to it until long after the crime has occurred. Of course, the government has no duty to inform any individual that he is a suspect or to keep him advised about the course of an investigation. Grand jury proceedings are conducted in secrecy, and an individual may never learn that he is a target until an indictment is handed down. See Pet. App. 26a. In addition, there is no general con-

stitutional right to discovery of the prosecution's evidence in a criminal case and no constitutional requirement that the prosecution reveal before trial the names of witnesses who will testify unfavorably to the defense. See *Weatherford v. Bursey*, 429 U.S. 545, 559-561 (1977). This Court has never suggested that the resulting "head start" by the government poses constitutional problems.¹³

Respondents Mills and Pierce devote particular attention (Br. 29-35) to the difficulties defense counsel face in investigating prison crimes. They point first to the shifting composition of the prison population and the difficulty of tracing inmates who have been transferred or released (*id.* at 30-31). As we pointed out in our opening brief (at 35-36, 42-43), prison inmates may be considerably less transient and more susceptible to identification than witnesses to some nonprison crimes because of the controlled conditions in prisons and availability of inmate records.¹⁴ Sev-

¹³ Respondents Mills and Pierce complain (Br. 40-41, 44) in particular that they were disadvantaged because inmates who were interviewed first by FBI investigators allegedly fabricated accounts of their activities on the day of the murder. When defense counsel eventually interviewed them, those inmates were reluctant to testify for the defense because of their prior inconsistent statements. The willingness of inmates to make false statements to authorities can hardly constitute a ground for concluding that a Sixth Amendment right to counsel exists at the preindictment stage. In any event, even if counsel had been appointed for respondents after they had been held in administrative detention for 90 days, as the court of appeals required, respondents presumably could not have prevented FBI investigators from being the first to interview any potential inmate-witness.

¹⁴ Because Lompoc is a high security level institution, the average length of sentence of inmates there is quite long. Thus, it is likely that most inmates who might have witnessed

eral respondents suggest that prison records and locator systems proved inadequate in this case. See, *e.g.*, Mills Br. 21; Ramirez Br. 25 n.13; Gouveia Br. 16. But if that is so, it is difficult to explain how respondents managed to locate so many inmate-witnesses. The defense in the *Mills* case presented 23 inmate-witnesses, while the defense in the *Gouveia* case presented 19 such witnesses.¹³ While prison records may not be perfect in every respect, courts cannot ignore the possibility that a defendant will often be able to use such records to track down alleged missing witnesses.¹⁴

a crime at Lompoc would still be in the federal prison system at the time of indictment.

¹³ Problems with inmate records did not necessarily prevent respondents from eventually locating witnesses. Respondent Gouveia complains (Br. 16) that there was no record of an inmate named Macias on the roster for M unit that was provided to him. However, Macias himself testified at trial. See pages 25-26, *infra*.

¹⁴ As we noted in our opening brief (at 36-39), there are other ways in which an inmate himself can ensure that there is a record of information that he may eventually need for his defense. Respondents and amici object that the alternatives we suggest are impractical and would require inmates to incriminate themselves. See, *e.g.*, Mills Br. 36-37; Ramirez Br. 23-25; ACLU Br. 28-29. Those objections are misguided. We do not, for instance, suggest that inmates are required to speak to FBI investigators or staff representatives. We merely point out that an inmate who wishes to preserve a record of witnesses or his account of his whereabouts on the day of a crime could avail himself of these opportunities for doing so, and that it is reasonable to anticipate that many erroneously suspected inmates would do so. At least some Lompoc inmates do use staff representatives. See our Brief in Opposition in *Young-Buffalo v. United States*, cert. denied, No. 83-5505 (Jan. 16, 1984), *supra* note 7, describing the petitioner's offer of a statement through his staff representative (a physician's assistant) at the Lompoc disciplinary hearing. A court should at least consider the possibility that an inmate

Respondents Mills and Pierce next stress (Br. 31-37) the problems created by the special value system of prison inmates, including a code of noninvolvement and noncooperation and an inclination to make untruthful statements to authorities. But it is these very factors that make it particularly difficult for the government to conduct investigation of prison crimes and to gather sufficient evidence to warrant initiation of a prosecution. FBI investigators in these cases interviewed scores of witnesses in an effort to obtain reliable evidence concerning who was responsible for the murders. See note 7, *supra*. Respondents allege (Mills Br. 44) that many of these witnesses lied to FBI investigators, but gave truthful statements to defense counsel at a later time. Assuming it was the initial statements (rather than the later testimony) that were false, this would merely illustrate the special difficulties the government encounters in uncovering the true version of events surrounding a prison crime.

Respondents' vivid descriptions of the difficulties faced by authorities in obtaining cooperation and truthful statements from inmates tend to disprove their contentions (see pages 13-14, *supra*) that there

did use, or could have used, available means of investigating or preserving evidence.

Respondent Gouveia takes issue (Br. 2) with the statements in our opening brief (at 3, 39 n.29) that he was released to the general prison population between November 22 and December 4, 1978, and thus could have engaged in investigation or otherwise preserved evidence. The affidavit of FBI agent Wilkins (J.A. 50) supports our statements. However, Gouveia's own affidavit (see J.A. 44-45) does not mention any release to the general prison population during this period. Records we have obtained from the Bureau of Prisons appear to confirm Gouveia's statement that he was not released to the general prison population until he was transferred to Leavenworth at the end of February 1979.

is some great imbalance between the investigative ability of the government, on the one hand, and that of inmate-suspects, on the other. While the government may have access to evidence at an earlier stage than defense counsel, the government is likely to have more difficulty in obtaining cooperation and truthful statements.¹⁷ And, of course, as we noted in our opening brief (at 43), the inmate-suspect always has the ultimate advantage in a later criminal proceeding—the prosecution's burden of proving guilt beyond a reasonable doubt.

4. Respondents and amici cite in support of their position cases such as *Powell v. Alabama*, 287 U.S. 45 (1932), in which this Court has recognized that one of the functions of counsel is to assist in preparation of a defense. See, e.g., *Ramirez* Br. 16; *Reynoso* Br. 29; *Mills* Br. 25-27; *NLADA* Br. 32. But those cases refer to preparation of a defense in the period following initiation of adversary judicial proceedings. Of course, if counsel were appointed on the day of trial of a serious felony charge, as was the case in *Powell*, a court would ordinarily conclude that a defendant had been deprived of the Sixth Amendment right to counsel. There is no contention in this case, however, that respondents' counsel had inadequate time in which to prepare a defense. Counsel for the *Gouveia* respondents were appointed on July 14, 1980; the first trial began on September 16, 1980, and the retrial began on February 17, 1981. See J.A. 1-2. Counsel for the *Mills* respondents were appointed on April 21, 1980; trial did not begin until January 1982, following grant of respondents' motion to dismiss the indict-

¹⁷ See, e.g., *Young-Buffalo v. United States*, *supra*, involving a brutal murder of a fellow-inmate at Lumpkin. Although approximately 100 inmates saw the petitioner smash the skull of the victim and nearly decapitate him, no inmate testified against petitioner at trial (83-5505 U.S. Br. in Opp. at 2).

ment and reversal on an interlocutory appeal. See J.A. 120. Thus, counsel in both cases had many months (close to two years in the *Mills* case) in which to investigate and prepare for trial. Respondents do not suggest that they lacked sufficient time to pursue all significant leads or that they would have taken any additional steps if they had had more time. Review of the extensive trial transcripts in these cases leaves no doubt that each respondent presented substantial evidence in support of his defense and was vigorously represented and that appointment of counsel could not have been further from the "sham" referred to at NLADA Br. 35-36 (quoting *Avery v. Alabama*, 308 U.S. 444, 446 (1940)).

Respondents contend, however, that they could have prepared better defenses if their counsel had begun investigations prior to the date the indictments were handed down. As an initial matter, we doubt very much that most appointed counsel conduct any extensive investigation during the preindictment stage, since discovery of the government's case is not available until after indictment. Thus, until counsel learns the time the government believes the crime occurred, he cannot search for alibi witnesses; and until he receives copies of the government's laboratory reports he cannot know what physical evidence may be available for analysis. But even assuming preindictment investigation would have allowed respondents to prepare better defenses, the same presumably would be so in many nonprison cases. In many instances it might be argued that an earlier indictment, a longer period for investigation, or various types of assistance from the government would have permitted a defendant to prepare a stronger case. But the Constitution does not require a perfect investigation. To the extent the Sixth Amendment right to counsel encompasses a reasonable opportunity to prepare a defense,

that opportunity is afforded when counsel is appointed at the initiation of adversary judicial proceedings and is given ample time prior to trial to prepare a defense.¹⁸

5. Respondents and amici raise various objections to our contention that, assuming *arguendo* there was a violation of the Sixth Amendment right to counsel in this case, the court of appeals failed to require the sort of specific showing of prejudice that would justify dismissal of the indictments. Respondents Mills and Pierce contend (Br. 46-50) that we are urging a departure from the standard set out by this Court in *United States v. Morrison*, 449 U.S. 361 (1981). But in fact we rely on *Morrison*. Our point is that the Court's decision in this case surely requires more than either a presumption or the sort of conclusionary finding of prejudice on which the court of appeals purported to rely in this case. *Morrison* does leave room for a showing that violation of the Sixth Amendment right to counsel creates a "substantial threat" of prejudice. See 449 U.S. at 365. But the Court in *Morrison* also stressed the extraordinary nature of the remedy of dismissal of the indictment (*ibid.*). It seems clear that, in a case in which it is urged that the court should dismiss with prejudice indictments for brutal

¹⁸ Respondents and amicus ACLU also cite this Court's precedents for the proposition that counsel must be appointed for any "critical stage." They contend that investigation is "critical" and that respondents were therefore entitled to appointment of counsel prior to indictment to aid them in investigating the murders. See, e.g., Segura Br. 17-22; Ramirez Br. 17-20; Mills Br. 25-26; ACLU Br. 24-27. But, as amicus NLADA acknowledges (Br. 24-25), it is the "critical stage" of a prosecution that triggers the Sixth Amendment right to counsel under this Court's precedents. Until the indictments in this case, there was no prosecution and thus no "critical stage."

murders, a "substantial threat" of prejudice must amount to more than speculation that, *e.g.*, a few unidentified missing witnesses might have testified in a manner that would have bolstered a defendant's version of the facts.

Respondents criticize us for contending that they must show some sort of actual (rather than hypothetical) prejudice in order to justify dismissal of the indictment in a right to counsel case. They maintain that courts should apply a less stringent standard for evaluating prejudice in Sixth Amendment cases, as opposed to Fifth Amendment cases. See, *e.g.*, *Mills Br.* 47-50. It is true that in some Sixth Amendment cases this Court has been willing to presume prejudice. For example, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court ordered a new trial for a defendant who had been unrepresented at trial without inquiring into whether he had been prejudiced by the lack of counsel. But the absence of counsel at trial goes to the heart of the Sixth Amendment right; moreover, the remedy of a new trial is far less drastic than dismissal of the indictment. Here, in contrast, assuming the failure to appoint counsel prior to initiation of adversary judicial proceedings falls within the Sixth Amendment right, it is surely at its fringes; and dismissal of the indictment is an extraordinary remedy. In such circumstances, it is clearly appropriate to require some showing of how the failure to appoint counsel in the preindictment period affected the defendant's ability to have a fair trial. Compare, *e.g.*, *Chambers v. Maroney*, 399 U.S. 42, 53-54 (1970).

Mills and Pierce urge that it is inappropriate to analyze the allegations of prejudice in this case in the same manner as claims of prejudice from preindictment delay. Presumably they take this position because they realize that they are unable to meet the

standard established by the preindictment delay cases.¹⁹ But it seems entirely reasonable to apply that analysis to this case, since the types of harm alleged and the remedy sought in the two types of cases are quite similar.

Amicus ACLU contends (Br. 46-53) that the appropriate standard for measuring prejudice in this case is a "relaxed" standard, modeled on that set out in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). We disagree.

In *Valenzuela-Bernal* the Court considered a claim that the government's deportation of aliens who were witnesses to the crime deprived the defendant of his Sixth Amendment right to compulsory process and his Fifth Amendment right to due process. The Court concluded that respondent could not establish a violation of either the Fifth Amendment or the Sixth Amendment merely by showing that deportation had deprived him of the testimony of the aliens; rather, he was required at least to make some plausible showing of how their testimony would have been material and favorable to his defense. 458 U.S. at 867-872. The Court also held that sanctions may not be imposed on the government for deporting witnesses unless a defendant "makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." *Id.* at 872-874.

We question the extent to which *Valenzuela-Bernal* should be characterized as generally having established a "relaxed" standard for proof of prejudice. That characterization appears to arise from the

¹⁹ Mills and Pierce abandoned their due process claims based on preindictment delay in their most recent appeal. See their court of appeals' brief in No. 82-1206 and 82-1278.

Court's suggestion (458 U.S. at 870) that defense counsel's inability to interview deported aliens because they are beyond the reach of the court's process "may well support a relaxation of the specificity required in showing materiality." The Court explained (*ibid.*) that such a situation nevertheless would not afford the basis "for wholly dispensing with such a showing." But in any event it would be inappropriate to apply any "relaxed" standard in this case, which differs in important respects from *Valenzuela-Bernal*. In the latter case there was no dispute that the deported aliens existed, that they were percipient witnesses, and that the government was aware of that fact when it deported them. Here there is no firm evidence that most of the alleged missing witnesses actually existed or that they would have been able to provide useful testimony. If the government released or transferred such individuals, it presumably did not do so in the knowledge that they were likely to be potentially important defense witnesses. Finally, release or transfer of inmates normally would not place them beyond the reach of the court's process. In view of the significant potential for fabrication of fictitious missing witnesses in cases like this one, a high standard for showing of prejudice is particularly appropriate.

6. In response to our contention that the court of appeals failed to require an adequate showing of prejudice to support dismissal of the indictments, respondents continue to offer sweeping generalizations about missing witnesses and faded memories. See, *e.g.*, Ramirez Br. 29, 32; Segura Br. 26-27; Mills Br. 40-41. Respondents do not dispute that they were able to produce large numbers of defense witnesses, nor do they suggest that there is any key point made by the government during trial that they were en-

tirely unable to counter because of an inability to investigate thoroughly.

Several respondents offer more specific allegations of prejudice. But even these are insufficient to establish that they failed to receive a fair trial and that dismissal of the indictments was required.

Respondent Reynoso contends (Br. 3, 5-6, 9, 13-14, 17) that he was unable to locate two witnesses, an inmate named "Sam" and a black prison guard, who could corroborate his statement to the FBI (J.A. 23) that between 2:00 and 3:00 p.m. on the day of the murder he was exercising and playing shuffleboard in the prison gymnasium.²⁰ He suggests (Br. 6 n.3) that the missing testimony would have served to impeach a witness, Gene Newby, who testified to having seen him with other respondents disposing of bloody clothing in the early afternoon on the day of the murder. In fact, Newby testified to having seen respondents shortly after noon (Tr. 1011, 1160). A pathologist testified that Trejo's death occurred between 12:00 and 1:00 p.m. (Tr. 160-164), and two alibi witnesses testified that between 10:00 a.m. and 1:10 p.m. Reynoso was watching a football game (Tr. 1415-1420, 1520-1525). The testimony of the two alleged missing witnesses about Reynoso's activities later in the afternoon would have been of little incremental benefit to his alibi defense.

Reynoso also maintains (Br. 17) that he was prejudiced because he was unable to call as a witness, or

²⁰ Contrary to his present claim (Br. 13), Reynoso knew the name of the prison guard who allegedly saw him at the gymnasium. See J.A. 15. Reynoso stated in his pretrial affidavit that he learned after the murder that the guard was no longer employed at Lompoc (*ibid.*). The record does not appear to indicate that Reynoso attempted, through the Bureau of Prisons or by other means, to ascertain the guard's whereabouts. See, e.g., *id.* at 21-22.

to obtain the statement of, inmate Michael Thompson, who was alleged by the *Gouveia* respondents to have admitted committing the murder of Trejo and who died prior to trial. Of course, Thompson's death and the resulting inability of the defense to call him as a witness were not the result of failure to appoint counsel prior to indictment, but rather the consequence of the passage of time between the murder and the trial. Moreover, Reynoso's claim that Thompson would have incriminated himself had he been available to testify is sheer speculation. Nor is there any reason to believe Thompson would have admitted to the murder and exonerated respondents if he had been interviewed by defense counsel prior to his death.²¹

Both Reynoso (Br. 16) and *Gouveia* (Br. 19-20) contend that they were prejudiced by the inability of defense witnesses to recall crucial events that took place during the period when the murder was committed. In support of that contention, they rely primarily on testimony at the first trial, which was aborted when the jury was unable to reach a verdict. However, many of the defense witnesses who were unable to recall events during the first trial suddenly regained their recollections of those events during the second trial. For example, Reynoso and *Gouveia* cite inmate Estrada's inability to recall either the date of the murder or a conversation he had with Michael Thompson on that day concerning the disposal of some

²¹ Even if Thompson had given such a statement, it is doubtful whether it would have been admissible. Fed. R. Evid. 804(b)(3) excludes exculpatory hearsay statements tending to expose the declarant to criminal liability "unless corroborating circumstances clearly indicate the trustworthiness of the statement." Reynoso acknowledges (Br. 29) that the trial court excluded testimony concerning an admission by Thompson to another inmate on the ground, *inter alia*, that it lacked the indicia of trustworthiness required by the Rule. See Tr. 2104, 2495.

knives Thompson allegedly was carrying. See J.A. 114-117. However, when called as a defense witness during the retrial, Estrada had no difficulty recalling the date of the crime or the fact that at approximately 1:00 p.m. Thompson had asked him if he "wanted to take [some] pieces" (i.e., knives) to another prisoner. Tr. 1843-1845, 1854-1857.²²

Gouveia claims (Br. 21-22) that his attorney's inability to locate and interview those inmates who lived in "M" Unit on the date of the murder prevented him from demonstrating that pieces of paper and a magazine bearing unidentified fingerprints, which were found in the cell where the murder occurred, had been placed there at some earlier point. Gouveia maintains that such evidence would have dispelled the adverse inference created by evidence that a piece of paper found in the cell contained his prints and those of Segura.²³ However, Gouveia apparently accom-

²² Reynoso also notes (Br. 16) inmate Olvera's inability during the first trial to recall with precision the time when he saw Gouveia on the day of the murder (J.A. 98-102). During the retrial, however, Olvera testified without equivocation that on the day in question he saw Gouveia in the corridor leading to the auditorium between 12:00 and 12:30 p.m. (Tr. 1680-1681, 1727, 1740). Gouveia complains (Br. 24) that inmate Allen testified that on the day of the murder he saw Gouveia in the "K Unit" of the prison sometime between 11:00 a.m. and 1:00 p.m. and that the inexactitude of this testimony seriously compromised Allen's value as an alibi witness. The cited testimony occurred at the first trial. See J.A. 106-107. During the retrial, Allen testified that he saw Gouveia between 11:00 and 11:15 a.m. while Allen waited to use the telephone (Tr. 1549-1550). Both Reynoso (Br. 16) and Gouveia (Br. 23 n.10, 24) cite the inability of inmate Broughton to recall at the first trial the time he was eating brunch with Gouveia (see J.A. 102-104). Broughton did not testify during the retrial.

²³ We note that in the courts below Gouveia did not allege that he had been prejudiced by his inability to locate inmates

plished the same result through the testimony of inmate Macias, the occupant of the cell, and through cross-examination of the fingerprint analyst. Macias testified that he had obtained the magazine from a friend and that he had obtained writing paper from a source within the unit (Tr. 840-842). During cross-examination by Gouveia's attorney, the fingerprint analyst acknowledged that none of over 70 unidentified prints found on various items in the cell matched those of the suspects, that Gouveia's prints were beneath some blood stains, and that there was no way of determining when or how Gouveia's prints were placed on the piece of paper (*id.* at 462-467).

Respondents Mills and Pierce contend (Br. 43-44) that they were unable to locate witnesses who could testify that months before the murder other inmates had "embarked on a campaign to rid the prison of [the victim] Mr. Hall," which led to the firebombing of his cell, so that they were "wholly foreclosed" from offering "powerful exculpatory evidence" showing that those inmates themselves had reason to commit the murder. Respondents did not cite this point below as a basis for their contention that the indictment should be dismissed.²⁴ In any event, respondents were not foreclosed from presenting evidence that other inmates had reason to kill Hall. A prison official testified that four months before Hall's murder, his cell

who could testify about the presence of the paper in the cell. See J.A. 67-69; Gouveia C.A. Opening Br. 12-18; Gouveia C.A. Reply Br. 4-11.

²⁴ See, e.g., J.A. 149-155; Mills C.R. 59, at 16-19, 23-24; Mills C.R. 73, at 6-9; 80-1540 Mills Br. 23-28; 80-1540 Pierce Reply Br. 13-18, 31-34. Indeed, the pretrial declaration of Pierce's attorney indicates that he did find witnesses who knew about threats to Hall, but that at that time they were unwilling to cooperate for various reasons (J.A. 150, 153-155).

was set on fire and he was placed in protective custody at his own request (Mills Tr. 1088-1093). A fellow inmate testified that Hall had a reputation as an informant, was engaged in gambling and drug transactions, paid protection money to another prisoner, and, long before the murder, made statements expressing fear for his life (*id.* at 1106-1109). Another inmate testified that, on the day before the murder, he overheard a conversation between Hall and respondent Mills during which Hall stated that several other inmates were pressuring him to repay a debt of several thousand dollars (*id.* at 1338-1339). On the basis of this evidence, respondents were able to argue during summation that, well before Hall was murdered, he was in "serious trouble" with other inmates (*id.* at 1655-1657).

As we explained in our opening brief (at 56-59), perusal of the record in this case confirms the conclusion of the dissenters below (Pet. App. 28a) that respondents' counsel presented "defenses of uncommon quality and vigor." The paucity of examples of prejudice offered by respondents in their answering briefs may be the best illustration of the error in the court of appeals' presumption of prejudice.

CONCLUSION

For the foregoing reasons, and the reasons discussed in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1984

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

—v.—

WILLIAM GOUVEIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES
UNION FOUNDATION AS *AMICUS CURIAE***

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No. 83-128

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

UNITED STATES OF AMERICA, Petitioner,
v.
WILLIAM GOUVEIA, ET AL., Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

Brief of the American Civil Liberties
Union Foundation As Amicus Curiae

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to preserving and defending the fundamental liberties guaranteed by the Bill of Rights. Since its representation of

the Scottsboro defendants in Powell v. Alabama, 287 U.S. 45 (1932), the case which established the modern shape of the Sixth Amendment right to counsel, the ACLU has participated in numerous cases where zealous governmental officials have attempted to secure prosecutions without affording the effective and timely counsel the Constitution guarantees.

This case raises a question concerning the scope of the right to counsel in a situation of prolonged detention where the procedural rules which ordinarily suffice to guarantee counsel necessary for the defense of a criminal case do not appear to apply. We file this brief amicus curiae to demonstrate the analytical failings of the Solicitor General's proposed constricted view of the right to counsel which would, if accepted, severely diminish the protection the Sixth Amendment guarantees.

Statement of the Case

This case raises the question of whether the Sixth Amendment right to counsel is triggered by an arrest and prolonged detention, or whether, as the Solicitor General contends, the government may indefinitely suspend an accused's constitutional right to counsel upon arrest and significant detention by simply delaying the initiation of formal judicial adversarial proceedings.

Respondents, all inmates at the Federal Correctional Institution at Lompoc, California, were detained in administrative segregation after the commission of crimes within the prison. Respondents continued to be confined in administrative custody for more than 19 months, in the case of four respondents, and eight months in the case of two others. Their confinement was maintained pursuant to

regulations authorizing the indefinite segregation of inmates who are subjects of a pending criminal investigation. See 28 C.F.R. § 541.22(a)(3) & (6)(i).

During their isolation in administrative custody, respondents were housed in three-by-five-foot cells. Their confinement was alleviated only by a short daily exercise period and scheduled visitation sessions. Although respondents were allowed access to legal materials and were permitted to make unmonitored telephone calls, they were effectively prohibited from any contact with the general prison population.

Despite the extraordinary length of their detention in solitary confinement pending investigation, government counsel in the case of respondents Mills and Pierce admitted in the district court that the authorities had obtained sufficient evidence to arraign respondents at the

time that they were originally placed in administrative detention, eight months prior to their indictment. Counsel further conceded that had respondents been at large on the evening of the murder, the government would have promptly arrested them, taken them before a magistrate and provided them with lawyers. JA 171. Pet. 46a.*

The United States Court of Appeals for the Ninth Circuit consolidated respondents' appeals from their respective convictions for en banc consideration of whether a federal prisoner suspected of committing a crime while in prison and placed in administrative detention is constitutionally entitled to an attorney prior to indictment. Answering that ques-

* JA refers to the Joint Appendix; Pet. signifies the Petition for a Writ of Certiorari.

tion in the affirmative, the court held that the Sixth Amendment requires that a federal inmate suspected of a crime and held in administrative detention beyond the period necessary to ensure security of the prison is entitled to appointment of counsel upon his showing that his continued detention is primarily due to the ongoing criminal investigation.

The court based its decision on the conclusion that for purposes of the Sixth Amendment prolonged administrative detention under these circumstances is tantamount to an arrest and accusation. Because such restraints inevitably hinder the preparation of a defense, the court reasoned that prompt appointment of counsel is necessary to ensure a fair trial.

Summary of Argument

A. This Court has not had occasion to define the scope of the Sixth Amendment right to counsel in a case involving prolonged, pre-charge detention because the rules of criminal procedure normally are sufficient to assure the prompt appointment of counsel in such circumstances. This case, because it arises in a prison setting where the customary procedural rules are inapplicable, illustrates the need for clarification that prolonged detention after arrest triggers a constitutional right to counsel.

The Solicitor General contends that, as a matter of constitution doctrine, the government may indefinitely suspend the Sixth Amendment right to counsel after a suspect has been arrested and detained by merely delaying indictment or arraignment. That interpretation is wholly at odds with the constitutional

framework of our criminal justice system and is not supported by this Court's precedent.

Government-imposed detention in advance of formal charges serves to burden the ability of the accused to mount a defense; the interference posed by the government's conduct on the accused's ability to investigate triggers the right to counsel.

The rule contended for here would be novel only in its explicit statement. It would have little effect upon the existing criminal justice system since procedural rules in every jurisdiction normally require the rapid appointment of counsel for a detainee. Moreover, the rule also fully comports with existing constitutional doctrine reflecting the significance of government restraints under the Sixth Amendment.

B. Like an arrest and significant detention, confinement of an inmate in administrative detention pending a criminal investigation triggers the Sixth Amendment right to counsel. Segregation of an inmate from the general population beyond the period specified for disciplinary purposes because he is the subject of a criminal investigation bears the clear indicia of an accusation. Not only is the inmate deprived of that limited liberty which he retains within the prison environment, but the government utilizes that restriction to benefit its own criminal investigation.

C. The Fifth Amendment also requires that the indictments against respondents be dismissed because the government's pre-indictment conduct deprived respondents of due process of law. Here, the government affirmatively placed obstacles in the way of respondents' ability to

prepare their defense, manipulating the timing of their indictments to gain tactical advantage over respondents at trial. For up to twenty months after the commission of the crimes with which they were ultimately charged, respondents were confined in administrative detention pursuant to regulations which purport to authorize indefinite confinement for "pre-trial inmates". The legitimate institutional interests served by isolation of suspect-inmates provides no justification for the pre-indictment delay; the effect of the extended period of pre-indictment administrative detention was to render respondents powerless to preserve evidence in their favor and to prepare their defense.

D. Respondents' proof of prejudice is sufficient under both the Fifth and Sixth Amendment standards to justify dismissal of the indictments against them. The applicable standard of showing preju-

dice here is the "relaxed requirement" of United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).

Because the government by its unilateral action deprived respondents of the opportunity to interview witnesses and to preserve material evidence, respondents are required, under the Valenzuela-Bernal standard of proof of prejudice, to make only a plausible showing that the pre-indictment delay had deprived them of witnesses' testimony that would have been material and favorable to their defense. The district court's characterization of the prejudice respondents suffered is based on specific findings of fact which demonstrate that respondents' proof met this "plausible showing" standard. Having carried their burden under the Fifth Amendment, the traditionally less stringent requirement of proof of prejudice under the Sixth Amendment was also met.

Argument

I. THE SIXTH AMENDMENT REQUIRES THAT COUNSEL BE APPOINTED FOR AN INDIGENT PRISON INMATE HELD IN EXTENDED SOLITARY CONFINEMENT PENDING A CRIMINAL INVESTIGATION AGAINST HIM.

Where, as here, the government essentially arrests and detains a suspect for a significant period of time pending criminal investigation, that suspect has a right under the Sixth Amendment to the assistance of counsel. This right, although implicit in our system of criminal justice, has never been expressed in constitutional terms for the simple reason that procedural rules normally have sufficed to protect the right of a detained suspect to the speedy appointment of counsel. Because this case arises in a context where those procedures are inapplicable, it vividly demonstrates the need

for clarification of the Sixth Amendment right.

Amicus rejects the argument of the Solicitor General that, apart from the current rules of criminal procedure, no constitutional limit prevents the government from indefinitely suspending the right of a detained suspect to counsel by simply delaying indictment or arraignment. To the contrary, both the fundamental purpose of the Sixth Amendment and this Court's construction of it amply support amicus' contention that respondents were unconstitutionally denied their right to counsel during the long periods they were held in solitary confinement because of the pending criminal investigations against them.

A. The Sixth Amendment Right To Counsel Attaches When Government Authorities Accuse A Suspect By Arrest And Significant Detention.

The Sixth Amendment provides that an accused shall enjoy the right "to have the Assistance of Counsel for his defence." This right, fundamental to our system of justice, is meant to assure fairness in the adversary criminal process. Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Glasser v. United States, 315 U.S. 60, 69-70, 75-76 (1942); Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938). This Court has frequently considered the varying circumstances under which the right to counsel attaches. See, e.g., United States v. Ash, 413 U.S. 300 (1973); Kirby v. Illinois, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967).

As a practical matter, however, this Court has never had occasion to de-

fine the scope of the right to counsel guarantee in a case involving prolonged detention in the absence of counsel, because the rules of criminal procedure have for decades prevented such a situation. For example, in federal prosecutions, Rules 5(a) and 44(a), Fed. R. Crim. P., require that a suspect who is arrested and detained be arraigned "without unnecessary delay" and that counsel be appointed before or at the arraignment. See also Powell v. Alabama, 287 U.S. 45, 57 (1932). Accordingly, as this Court is well aware, the typical criminal case involves either brief detention following arrest, without necessity of appointment of counsel, or continued custody after arrest triggering a speedy arraignment and appointment of counsel pursuant to existing rules. Rules 5(a), 44(a), Fed. R. Crim. P.

In the prison context, however, the safeguards offered by the rules of

criminal procedure are unavailable. But see Smith v. United States, 409 U.S. 1066 (1972) (Douglas, J.) (dissent from denial of petition for certiorari) (suggesting applicability of Rule 5, Fed. R. Crim. P., to prison setting). This case, because of its prison setting, raises the serious yet easily bridged gap between the largely-unlitigated constitutional and the universally-recognized, rule-created right to counsel upon arrest and prolonged detention.

In light of the absence of an explicit constitutional mandate in the case law, the Solicitor General takes the position that arrest and prolonged detention have no significance under the Sixth Amendment. Implicit in the Solicitor General's position is a constitutional license for the government to restrain persons accused or suspected of crimes for indefinite periods without triggering the

right to counsel, a situation which would leave detainees stranded in jail with no assistance whatsoever. This Orwellian interpretation of the Sixth Amendment must be rejected as wholly at odds with traditional constitutional doctrine and fundamental notions of the criminal justice system in America. Accordingly, amicus urges the Court to clarify and make explicit the constitutional requirement of appointment of counsel upon the arrest and significant detention of a suspect.

The Solicitor General errs in relying on Kirby v. Illinois, 406 U.S. 682 (1972) (plurality opinion), for the remarkable proposition of Sixth Amendment law he urges this Court to adopt. In essence, the Solicitor General contends that so long as a non-adversarial determination of probable cause has been made, thereby satisfying the Fourth Amendment concerns at issue in Gerstein v. Pugh, 420 U.S. 103

(1975), the detained person may be left to languish in jail for years without benefit of counsel, unless and until formal judicial adversary proceedings are commenced, finally triggering a right to counsel under Kirby.

Kirby does not control this case. The Court in Kirby was confronted with the entirely different question of whether the Sixth Amendment requires a per se rule excluding from evidence at trial the fruits of an uncounselled out-of-court lineup conducted after an arrest but prior to indictment. In determining that no such per se exclusionary rule was constitutionally compelled by the facts presented in Kirby, the Court said nothing that properly illumines the question of whether prolonged detention after arrest may trigger a right to counsel in circumstances where the absence of counsel may forever preclude an effective defense.

Moreover, although the significance afforded by the plurality opinion in Kirby to the onset of "adversary judicial proceedings" in triggering a right to counsel has been followed in other cases, the central fact remains that the Kirby Court did not set out an absolute litmus test. Instead, the Kirby "adversarial proceeding" notion is a shorthand formula for the Sixth Amendment's fundamental underlying purpose: the right to counsel attaches whenever necessary "for [the] defence" of an accused. United States v. Ash, 413 U.S. at 306. Those occasions when the right to counsel is necessary are labeled "critical;" in determining whether such assistance is necessary at any given time, the Court has found the adversarial nature of the proceeding to be a relevant, but not controlling, factor. See id. at 316-17.

For example, the Court has ruled that even after the commencement of formal proceedings a criminal defendant has no right to counsel at a photographic display because the display is not a "critical stage" in the prosecution. Id. at 321. On the other hand, a defendant in custody has an absolute right to have counsel present at post-arrest interrogations, even though those interrogations take place before actual judicial proceedings are begun. See Miranda v. Arizona, 384 U.S. 436, 470-71 (1966) (addressing Fifth Amendment privilege against self-incrimination but relied upon in United States v. Wade, 388 U.S. 218 (1967), for Sixth Amendment analysis).

In contrast to the Solicitor General's reading of the Sixth Amendment, the rule contended for here would be novel only in its explicit statement. In practical terms, recognition that the Consti-

tution guarantees the right to counsel after a significant period of detention would not alter the day-to-day workings of the criminal justice system, since procedural rules in every jurisdiction normally dictate the rapid appointment of an attorney. It would only be in the unusual case, such as the instant one, that the constitutional protection would necessarily be invoked.

Moreover, the standard proposed here fully comports with existing constitutional doctrine. Indeed, this interpretation of the Sixth Amendment right to counsel finds direct support in this Court's construction of the speedy trial guarantee found in the same amendment. The Court has termed the Sixth Amendment speedy trial provision "'an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public

accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.'" United States v. Marion, 404 U.S. 307, 322 (1971), citing United States v. Ewell, 383 U.S. 116, 120 (1966). Thus, in United States v. Marion, this Court made clear that invocation of the Sixth Amendment for speedy trial purposes need not await indictment, information or other formal charge. 404 U.S. at 321. Rather, the Court emphasized that "the actual restraints imposed by arrest and holding to answer a criminal charge" suffice to render one "accused," thus triggering the constitutional protection of a speedy trial. Id. at 320. See also Dillingham v. United States, 423 U.S. 64, 65 (1975) ("the Government constitute[s] petitioner an 'accused' when it arrest[s] him and thereby commence[s] its prosecution of him").

Like the speedy trial provision, the purposes of the Sixth Amendment right to counsel guarantee require that the right attach when "actual restraints" are imposed upon a suspect's liberty for any significant period. As explained by this Court, the right to counsel provision seeks to ensure that an accused receives assistance at every critical stage of the proceedings against him, United States v. Ash, 413 U.S. at 307-08, and to minimize the imbalance in the adversary system created by the establishment of a public prosecutor. Id. at 309.*

* At least one lower federal court has recognized this application of the Sixth Amendment right to counsel. In United States ex rel. Burton v. Cuyler, 439 F. Supp. 1173 (E.D. Pa. 1977), aff'd without opinion, 582 F.2d 1278 (3d Cir. 1978), the court was confronted with the application of Kirby where the defendant "is under arrest or is somehow restrained of his liberty but has not been indicted or arraigned or had a preliminary (Footnote continued)

A prolonged period of pre-trial detention clearly constitutes a "critical

nary hearing." Id. at 1179.

In Cuyler, the Court ultimately decided that under Pennsylvania law the issuance of an arrest warrant had commenced the "adversary proceedings" against the petitioner even though the warrant was not served until after the uncounselled lineup, conducted while the defendant was in custody on charges unrelated to the case. Id. at 1181. The Court was persuaded that the true reason for holding the lineup was merely to enhance the prosecution's evidence rather than to investigate and that as of the date of the lineup the state had committed itself to prosecute, albeit informally. Id. In an analysis directly applicable to this case, the court noted:

Given the facts of this case, we need not decide whether the issuance of a warrant for arrest is sufficient in itself as a matter of federal law to trigger relator's right to counsel. We do not believe, however, that by simply delaying the occurrence of an arraignment or preliminary hearing (as was done in this case, presumably because relator was in custody on another charge) the state can in effect suspend the right to counsel

(Footnote continued)

period" in the preparation of a defense. Confinement during this time in the absence of counsel impairs the accused's ability to confer with potential defense witnesses or even to keep track of their whereabouts. See Smith v. Hooey, 393 U.S. 374, 379-80 (1969) (discussing right to speedy trial). And, although evidence and witnesses can disappear during the course of any criminal proceeding, "a man isolated in prison is powerless to exert his own investigative efforts to mitigate those erosive effects of the passage of time." Id. at 380.

Moreover, in the case of prolonged pre-charge detention imposed exclusively because of the pendency of the gov-

until it has neatly tied its case together and obtained, unmonitored, the desired lineup identifications.

Id. at 1181-82.

ernment's criminal investigation, it is the government that is imposing obstacles to the preparation of a defense, a factor which significantly alters the government's responsibility under the Sixth Amendment. Not only is such a period "critical" to the preservation of evidence, but the right to counsel is absolutely necessary to counter the imbalance created by the government's ability to restrain the suspect while it completes its case.

This Court has long recognized that one of the fundamental aspects of the right to counsel is the attorney's assistance before trial in investigating the case and preparing a defense. Thus, where counsel is not appointed during the "critical period . . . when consultation, thoroughgoing investigation and preparation [are] initially important," subsequent appointment of counsel will not cure

the original deprivation. Powell v. Alabama, 287 U.S. at 57. Nonetheless, in the instant case the Solicitor General seeks to justify the belated appointment of counsel on the ground that a target held in solitary confinement during investigation is no more prejudiced by the appointment of counsel at indictment than is a target who suffers no restraints during the investigatory period.

This position is erroneous for two reasons. First, it assumes investigative abilities on the part of administrative detainees that defy common sense. Second, it focuses on whether or not a target will normally prepare a defense in advance of formal charges rather than on the real question at issue: whether the government may burden the freedom to do so by detaining the target, or as in the instant case, placing him in solitary confinement, without assistance of counsel.

As a practical matter, the procedures by which a segregated inmate purportedly may, according to the Solicitor General, gain and preserve evidence during a lengthy period of pre-charge solitary confinement are unworkable. Although theoretically an inmate could, as suggested by the Solicitor General, create his record by interviews with the FBI, he would waive his privilege against self-incrimination in the process. Equally unfeasible is the possibility that an inmate would place his trust in a member of the prison staff to help him organize his case or that other inmates would offer much assistance to that staff member in light of the apparent conflict of interest. See, e.g., Hooks v. Wainwright, 536 F. Supp. 1330, 1348 (N.D. Fla. 1982) (noting inherent conflict of interest of prison staff members employed to provide legal assistance to inmates against prison

administration). Finally, the ludicrous suggestion in the Solicitor General's brief, at page 39, that administrative detainees can pursue their own investigations by speaking through conduits, air vents and windows betrays the utter lack of merit in the government's position here.

It is thus obvious that administrative detainees, left to their own devices, do not have the means to gather and preserve evidence. Indeed, since effective segregation from other prison inmates and personnel is exactly what the detention is intended to ensure, it ill behooves the Solicitor General to rely on a contention that such segregation may on occasion be unsuccessful in attaining its goals. Cf. Smith v. Hooey, 393 U.S. at 378 (discussing inability of inmate in general population to investigate).

Equally misplaced is the Solicitor General's argument that neither general population inmates nor non-inmate targets have unlimited abilities to pursue investigations. That contention overlooks the critical distinction that in this case, or any case of pre-trial detention that is imposed only by virtue of a pending investigation of charges not yet brought, the government is affirmatively burdening the suspect's ability to investigate and mount a defense.

As this Court has pointed out in other contexts, although the government normally has no obligation affirmatively to provide for the exercise of a right, it may not affirmatively obstruct that right. For example, in United States v. Valenzuela-Bernal, 458 U.S. 858 (1982), the Court recognized that deportation by the government of a material, favorable witness for the defense can establish a

violation of the compulsory process clause of the Sixth Amendment. Id. at 873.

The Court has articulated this same principle in a recent line of cases dealing with abortion. It has concluded that although the government is not obligated to pay for the exercise of a woman's right to an abortion, it may not affirmatively block her access to that right by restrictive regulation. Compare Harris v. McRae, 448 U.S. 297, 315-17 (1980) (federal funding regulation which by unequal subsidization of abortion and other medical services encourages alternatives to abortion passes constitutional scrutiny because government has placed no barrier to exercise of right to abortion) and Maher v. Roe, 432 U.S. 464, 471-74 (1977) (Connecticut funding regulation favoring childbirth over abortion by means of unequal subsidization does not impinge on constitutional freedom to abortion because

it imposes no government restriction on access to abortion) with City of Akron v. Akron Center for Reproductive Health, _____ U.S. _____ (1983) (striking down as unconstitutional municipal ordinance regulating various aspects of the performance of abortions as unreasonable infringement on woman's constitutional right to obtain abortion). Thus, it is the fact of government restraint on a right, rather than a particular individual's capacity to exercise it, that becomes the focus of constitutional inquiry.

In the present case, it is the government's imposition of obstacles to respondents' ability to investigate and prepare a defense that gives rise to a right of counsel. Even though the passage of time will cause evidence to disappear and memories to fade in any criminal case, here the fact of government-imposed custody prevented respondents from attempting

to mitigate those losses. See Smith v. Hooey, 393 U.S. at 380. Because of this government restraint, respondents' claim of an impaired defense cannot, under the Sixth Amendment, be equated with that of a suspect who is free of confinement. Accordingly, the Sixth Amendment must be read to guarantee a right to counsel in advance of formal judicial adversary proceedings where lengthy pre-trial detention impairs the ability of the accused to prepare his defense.

B. Confinement Of An Inmate In Segregated Custody Pending A Criminal Investigation, Like An Arrest And Detention, Triggers The Right To Counsel.

In considering respondents' claims that they were unconstitutionally denied access to counsel, the court of appeals correctly found that prolonged administrative detention can serve an accusatory function, at which point the right to counsel attaches. Central to the

court's holding, but remarkably distorted by the Solicitor General, is the condition that the prisoner be held because of an impending investigation and indictment related to a serious crime. United States v. Gouveia, 704 F.2d 1116, 1124 (1983).

By so holding, the court carefully distinguished between administrative segregations used for internal prison purposes and those utilized only because the government is preparing new charges against the inmate. Id. Importantly, even where counsel must be appointed, the court's holding in no way threatens the use of administrative detention for either purpose.

Segregation of an inmate from the general population beyond the period

specified for disciplinary purposes* because he is the subject of a criminal investigation bears the unmistakable indicia of an accusation. The government not only points its finger at him as the target of an inquiry but actually brings its forces to bear on him by prolonged detention during that investigation. Indeed, although prison inmates clearly have much diminished liberty interests, see Hewitt v. Helms, _____ U.S. _____, 103 S. Ct. 864 (1983), the additional restraints imposed by solitary confinement are directly analogous to the arrest and detention of an

* The Solicitor General suggests that the court of appeals erred in calculating the permissible period of administrative detention as 90 rather than 150 days. Although we question the Solicitor General's reading of the regulations, the more important point is that even applying the 150 day rule, the government still maintained respondents in isolation without counsel for an additional three to fourteen months.

ordinary citizen. As this Court explained in Smith v. Hooey:

At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from 'undue and oppressive incarceration prior to trial.' But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge.

393 U.S. at 378 (applying Sixth Amendment right to speedy trial). Cf. Hewitt v. Helms, ____ U.S. at ____, 103 S. Ct. at 875 (Stevens, J., dissenting) (transfer to solitary confinement from general prison population constitutes severe impairment of residuum of liberty which prisoner retains).

Like the arrest and detention of a suspect on the street, transfer to solitary confinement based on the belief that the inmate has committed a criminal act establishes the adversarial positions of

the parties. Since the police could not arrest and hold a non-inmate suspect indefinitely without the appointment of counsel, there is no rational basis for allowing the government to do so within prison walls. Cf. Mathis v. United States, 391 U.S. 1 (1968) (inmate entitled to be free of uncounselled custodial interrogation on separate offense); United States v. McLemore, 447 F. Supp. 1229 (E.D. Mich. 1978) (arrest followed by subsequent nine-month detention of escaped inmate before initiation of charges violated inmate's Sixth Amendment right to speedy trial; fact that inmate was not lawfully at large did not make interference with his liberty any less of an arrest).*

* The Solicitor General argues that the arrest analogy based upon the Sixth Amendment right to a speedy trial fails because both arrest and holding
(Footnote continued)

Admittedly, administrative detention is a necessary fact of prison administration. As pointed out by the court of appeals, "[t]emporary isolation, imposed to defuse a potentially explosive confrontation and to protect inmates from harm, is part of the correctional process." 704 F.2d at 1121. But the prolonged detention involved here was not "temporary isolation" nor was it for the purpose of prison security. Despite the

to answer a criminal charge are necessary to engage the speedy trial right. According to the Solicitor General, respondents were not "held to answer" a criminal charge until they were indicted, Pet. Brief 30, thus ignoring the period of up to 20 months that respondents were kept in isolated custody pending investigation and indictment. That the Court has already rejected such a lame position is not surprising. See Dillingham v. United States, 423 U.S. at 65 (22-month period of delay between arrest and indictment to be considered in Sixth Amendment claim for denial of speedy trial).

Solicitor General's transparent attempt to recast the facts in a more sympathetic light, both the court of appeals and the district court in the case of respondents Mills and Pierce, found that respondents were restrained because of the pending investigations. In light of these findings, the Solicitor General's efforts to rewrite the record are unavailing.* See

* That respondents were retained in isolated custody for the purpose of criminal investigation as opposed to internal prison reasons provides the critical distinguishing point between this case and those cases cited by the Solicitor General for the proposition that segregation does not trigger the Sixth Amendment right to a speedy trial. See United States v. Mills, 704 F.2d 1553, 1556-57 (11th Cir. 1983) (disciplinary segregation); United States v. Daniels, 698 F.2d 221, 222 (4th Cir. 1983) (same); United States v. Bambulas, 571 F.2d 525, 527 (10th Cir. 1978) (speedy trial claim time-barred); United States v. Clardy, 540 F.2d 439, 441 (9th Cir. 1976) (disciplinary segregation); United States v. Duke, 527 F.2d 386, 389 (5th Cir.), cert. denied, 426 U.S. 952 (1976) (disciplin-

(Footnote continued)

Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967) (Supreme Court will not review concurrent findings of fact by two courts in absence of exceptional showing of error).

To the contrary, detention of a suspect in solitary confinement pending investigation of a crime on the presumption that he will intimidate witnesses only furthers the conclusion that the government has adopted an adversarial position toward the suspect. By placing the inmate in solitary confinement pending a criminal investigation, the government manifests not only its intent to pursue

ary segregation accompanying breach of prison regulation "in no way" related or dependant on federal prosecution). But see United States v. Blevins, 593 F.2d 646, 647 (5th Cir. 1979) (rejecting speedy trial claim by prisoner based on seven-month delay between confinement in administrative segregation pending investigation and indictment).

the inmate for the crime but also its assumption that the inmate would obstruct that pursuit. At this juncture, the adversarial nature of the confinement is apparent, thereby triggering the inmate's right to counsel. Assuming arguendo that the continued use of administrative detention pending investigation is necessary to facilitate the inquiry and ensure security, those purposes do not disengage the inmate-detainee's right to counsel.*

II. THE GOVERNMENT'S PRE-INDICTMENT
DELAY DEPRIVED RESPONDENTS OF DUE PROCESS
IN VIOLATION OF THE FIFTH AMENDMENT.

* By analogy, post-arrest custodial interrogation of suspects often facilitates police investigation but its necessity does not do away with the suspect's right to counsel. Miranda v. Arizona, 384 U.S. at 470-71.

This case does not present the typical pre-indictment delay issue in which defendants contend that the mere passage of time between commission of the offense and indictment has prejudiced the preparation of a defense. Nor is this a case in which the government can in good faith contend that the delay was the result of an ongoing investigation. See JA 171; Pet. 46a. Rather, here, the government affirmatively placed obstacles in the way of the respondents' defense, using the time between the commission of the offense and the indictment "to gain tactical advantage over the accused." United States v. Marion, 404 U.S. 307, 324 (1971).

In this case, the government placed indigent prisoners in administrative detention for up to twenty months pursuant to regulations which purport to authorize open-ended detention of "pre-trial inmates." 28 C.F.R. § 541.22(a)(3)

& (6)(i). Because these inmates did not have the means to retain counsel and because of the delayed indictment, the effect of administrative detention was to render these "pre-trial inmates" powerless to preserve evidence in their favor and to prepare their defense. This one-sided form of pre-indictment delay, in which the government justifies solitary confinement on the ground that an inmate is pending trial but prevents an indigent, "pre-trial inmate" from having the assistance of counsel by delaying indictment, cannot possibly comport with those "fundamental conceptions of justice which lie at the base of our civil and political institutions," [citation omitted], and which define "the community's sense of fair play and decency, [citation omitted]." United States v. Lovasco, 431 U.S. 783, 790 (1977).

Of course, as the Court has noted, "the isolation of a prisoner pending investigation of misconduct charges against him serves important institutional interests relating to the insulating of possible witnesses from coercion or harm." Hewitt v. Helms, ___ U.S. at ___, 103 S. Ct. at 872. The coercion or harm that pre-trial isolation is intended to prevent, however, is premised on the presumption, inherent in the regulations authorizing pre-trial detention, that a trial is to be held and that inmates with potentially adverse testimony to give at trial may be threatened by an inmate-defendant released into the general prison population. The legitimacy of isolation of the suspect-inmate cannot itself provide justification for the pre-indictment delay. Indeed, the Court has asserted that "administrative segregation may not be used as a pretext for indefinite confinement of

an inmate." Id. at ___, 103 S. Ct. at 874.

Moreover, given the transient nature of the prison population, the institutional interest in insulating potential witnesses from coercion or harm diminishes with the passage of time, as the inmate-witnesses are paroled or transferred to other institutions. Thereafter, no legitimate investigative purpose is conceivably served by continuing to hold the suspect in segregated confinement. As this institutional interest in the security of other inmates diminishes, therefore, the constitutional interests of avoiding pre-trial delay for "pre-trial inmates" must assume relatively greater importance. Whether or not the procedures under which inmates are indefinitely confined pending trial comport with due process, the government's unjustified delay in obtaining indictments against such

"pre-trial inmates" is an improper tactic which is inconsistent with the due process guarantee.

III. RESPONDENTS' PROOF OF PREJUDICE WAS SUFFICIENT TO JUSTIFY DISMISSAL OF THE INDICTMENTS AGAINST THEM.

A. The Showing Of Prejudice That Respondents Must Establish Is The "Relaxed Standard" Enunciated In United States v. Valenzuela-Bernal.

The degree of prejudice that must be demonstrated to support a due process claim under the Fifth Amendment and a claim of infringement of the right to counsel under the Sixth Amendment varies with the circumstances attending the claim. Although a showing of actual prejudice is frequently required for Fifth Amendment purposes, see United States v. Lovasco, 431 U.S. at 789-90, United States v. Marion, 404 U.S. at 324-26, the analy-

sis under the Sixth Amendment is more lenient.

The Court has long regarded "[t]he right to have assistance of counsel [as] too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. at 76. For this reason, the Court has often reversed convictions without an analysis of prejudice where the violations of the right to counsel posed obvious threats of serious harm. E.g., Holloway v. Arkansas, 435 U.S. 475 (1978); Herring v. New York, 422 U.S. 853 (1975); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). See United States v. Morrison, 449 U.S. 361, 365 (1981) (dismissal of indictment based on violation of right to counsel justified by showing of substantial threat of demonstrable prejudice).

The standard of proof of prejudice applicable to this case can be no greater than that recently enunciated by this Court in United States v. Valenzuela-Bernal, 458 U.S. 858 (1982). In that case, the Court expressly held, for both Fifth and Sixth Amendment purposes, that "a relaxation of the specificity required in showing materiality" is appropriate where, by virtue of the unilateral act of the government, neither the defendant nor his attorney has been afforded an opportunity to interview witnesses. Id. at 870 (emphasis supplied).

Such a relaxation is appropriate because "a defendant who has not had an opportunity to interview a witness may face a difficult task in making a showing of materiality." Id. at 871. Thus, although the Court has been unwilling to dispense wholly with the prejudice requirement, it has indicated that a showing

of "the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality," id. at 871, and that "sanctions will be warranted . . . if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." Id. at 873-74.

The relaxed standard of the necessary showing of prejudice enunciated in Valenzuela-Bernal is directly applicable to this case. Indeed, the handicap imposed on respondents as a result of the extended period of pre-trial administrative detention imposed by the government and the government's unjustifiable pre-indictment delay were substantially greater than the circumstances confronting the defendant in Valenzuela-Bernal. In Valenzuela-Bernal the defendant, though deprived of an opportunity to interview

material witnesses whom the government had deported prior to trial, still was in a reasonable position to make a showing of the subjects on which such witnesses might testify at trial because of the particular facts of that case.*

Here, for up to 20 months prior to indictment respondents were deprived of any opportunity whatsoever even to identify, let alone interview, other prisoners who may have witnessed the crimes with which defendants were to be charged, to interview witnesses who could have cor-

* The defendant in Valenzuela-Bernal was charged with transporting illegal aliens in an automobile of which he was the driver; the aliens were his passengers. 458 U.S. at 860. The Court noted that the defendant was accordingly in a position to know what his passengers - the deported illegal aliens - saw and said during the course of the automobile ride at issue. Id. at 871. As a result, the defendant was capable of making at least some showing concerning their likely testimony. Id.

roborated their alibis and to preserve physical evidence essential to corroborate their testimony and to rebut the evidence against them. In contrast to the defendant in Valenzuela-Bernal, respondents were consequently not in a position to make any concrete showing of who their missing witnesses were or what their testimony might be. Therefore, under the principles set forth in Valenzuela-Bernal, the standard of proof of prejudice to which respondents should if anything be held should be more lenient than that imposed upon the defendant in Valenzuela-Bernal.

- B. Respondents Made A Plausible Showing That Their Prolonged Pre-Indictment Detention Without Counsel Deprived Them Of Witnesses' Testimony That Would Have Been Material And Favorable To Their Defense And Therefore Satisfied The Valenzuela-Bernal Prejudice Standard.
-

As the Ninth Circuit noted, the district court "found that [respondents]

had been irreparably prejudiced because of the dimming of memories of exonerating witnesses, the loss of witnesses, and the deterioration of physical evidence." 704 F.2d at 1119 (emphasis supplied). In reviewing the evidence of prejudice on appeal, the Ninth Circuit found that the district court accurately characterized the prejudices suffered.

Specifically, defendants have been prejudiced by the dimming of memories of witnesses who could have substantiated their alibi; by the irrevocable loss of inmate witnesses known to the defendants only by prison 'nicknames' now long-since transferred to other institutions or released from custody altogether; and by the deterioration of physical evidence essential to corroborate the defendants' testimony and to rebut the evidence against them."

Id. at 1125 (emphasis supplied).

Under the standards set forth in Valenzuela-Bernal, and given the circumstances of this case, this finding of "substantial prejudice" went further than

necessary and is therefore sufficient to justify dismissal of the indictments on both Fifth and Sixth Amendment grounds.*

* For purposes of the respondents' Fifth Amendment claim of undue pre-indictment delay, the Court must also take into account in assessing prejudice the separate question of the oppressive manner of respondent's confinement during the period of delay. It is established law for purposes of post-indictment delay analysis under the Sixth Amendment that one factor that must be considered is "oppressive pretrial incarceration." See United States v. Valenzuela-Bernal, 458 U.S. at 869 (quoting United States v. MacDonald, 435 U.S. 850, 860 (1977) and Barker v. Wingo, 407 U.S. 514, 532 (1972)). This factor is not at issue in the customary pre-indictment delay claim under the Fifth Amendment because such delay normally occurs at a time that the ultimate defendant is at liberty, or at least is not confined by virtue of the pendency of investigation. Respondents are in the unusual posture of having been subjected to oppressive pretrial incarceration in advance of any indictment, thus triggering the applicability of the Sixth Amendment analysis to their Fifth Amendment claim. There can be little dispute that respondents' placement in solitary confinement for more than nineteen months, with all the terri-

(Footnote continued)

CONCLUSION

For the reasons stated above,
the judgment of the court of appeals
should be affirmed.

Respectfully submitted,

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February 3, 1984

ble conditions such confinement
entails, constitutes "oppressive pre-
trial incarceration."

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**WALTER L. STEVENS,
CLERK**

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

—vs.—

WILLIAM GOUVEIA, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF THE NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION, *AMICUS CURIAE***

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No. 83-128

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

UNITED STATES OF AMERICA, Petitioner

vs.

WILLIAM GOUVEIA, ET AL., Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTEREST OF AMICUS

The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose members include the great majority of public defender offices, coordinated assigned counsel systems and legal services agencies in the nation. The organization also includes two thousand individual members, most of whom are private practitioners.

NLADA's primary purpose is to assist in providing effective legal services to persons unable to retain counsel. In carrying out this purpose, NLADA has a strong interest in protecting its members' clients' constitutional right to effective assistance of counsel in criminal prosecutions. Consistent with this interest, NLADA believes that indigent prisoners are entitled to the assistance of appointed counsel when they are detained and segregated from the prison population in anticipation of a prosecution for a crime that occurred in the institution. This brief is filed in support of the respondents.

ARGUMENT

THE LAWFULLY INCARCERATED PRISONER WHO, BEFORE FORMALLY BEING CHARGED, IS ISOLATED IN ADMINISTRATIVE DETENTION PENDING INVESTIGATION AND TRIAL FOR A CRIME COMMITTED IN THE PENAL INSTITUTION IS CONSTITUTIONALLY ENTITLED TO THE ASSISTANCE OF APPOINTED COUNSEL WHEN THE PROLONGED NATURE OF THAT DETENTION THREATENS THE BALANCE IN THE ADVERSARIAL PROCESS BY IMPAIRING THE ACCUSED'S ABILITY TO PREPARE A DEFENSE.

A. Introduction And Summary Of Argument

The right to representation by counsel "is of the essence of justice." Kent v. United States, 383 U.S. 451, 561 (1966). The laudable role of jurisprudence is to ascertain the principles upon which the foregoing rule is based and to study the manner in which new or doubtful cases should be governed by it. This constant process of reexamining established rules of law in the context of varying factual situations promotes a

refinement in the law that would be wholly lacking otherwise.

Thus mindful of the fundamental nature of the right to counsel, the instant case provides the first opportunity for this Court to consider that Sixth Amendment guarantee under circumstances unique to prison crime prosecutions. While the analysis must track the path of this Court's prior decisions affecting the scope and application of the Sixth Amendment right to counsel, guidance on this frontier of constitutional interpretation also must be drawn from a sensitive scrutiny of the realities of the prison environment. A principled examination of both precedent and policy confirms that the detained prisoner's right to appointed counsel prior to formal indictment for a prison crime must be accommodated if the historical spirit of the Sixth Amendment

is to be realized in this unique setting.

As a society whose mission is to punish, discipline and segregate its members from the law-abiding community at large, the prison environment necessarily reflects significantly less regard for the many liberties that citizens outside prison walls enjoy. Price v. Johnson, 334 U.S. 266, 285 (1948). The governed populace of the prison society are subject to intrusions on personal freedom and privacy that are plainly abhorrent to those not burdened by the disabilities of a criminal conviction and incarceration. Though lawfully deprived of liberty, prisoners retain a residuum of constitutional rights. "[H]is rights may be diminished by the needs and exigencies of the institutional environment, [but] a prisoner is not wholly stripped of constitutional protections when he is

imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555 (1974). Constitutional guarantees in the prison context inevitably are affected "by the nature of the regime to which [prisoners] have been lawfully committed." Id. at 556. And if certain of those guarantees are to endure at all in that hostile context, the required accommodation may have to be in the form of acute augmentation of the right rather than contraction of it. The goal, however, is "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." Id. at 556.

Just as free society is plagued by crime, the prison community is victimized by that same societal evil. While the residents of the penal institution

are convicted criminals themselves, they are no less entitled to protection from the criminal activity of their colleagues than are free citizens. Moreover, prison administrators have a compelling interest in maintaining good order in a close physical confinement among residents who already are prone to violence or lawlessness of one kind or another. Hewitt v. Helms, ___ U.S. ___, 74 L.Ed.2d 675, 689 (1983).

But in the investigation and prosecution of prison crime, the government wields a degree of power to control and shape the course of events that is not duplicated in the sphere of law enforcement outside of prison walls. Of course, once the trial of the prisoner-defendant has commenced, proceedings against him inside the courtroom can be expected to conform to all of the standard constitutional norms that

govern any criminal prosecution. The danger, however, is that by exercising its nearly autonomous control over the prisoner-defendant's liberty interests prior to commencement of the formal proceedings, the government is effectively able to thwart certain of the accused's constitutional rights as it marshals its already superior litigational resources to prepare for that prisoner's prosecution.

The Sixth Amendment right to counsel applies to the prosecution of prison crime just as to any other criminal prosecution. United States v. Clardy, 540 F.2d 439 (9th Cir), cert. denied, 429 U.S. 963, (1976). Yet the government is in a position to exploit all of the advantages of detaining and isolating an uncounseled prisoner whose formal prosecution for an institutional crime is imminent but delayed as a

matter of unchecked prosecutorial discretion. There can be no doubt that the risk of tainted fact-finding and erroneous deprivation increases as the realistic opportunity for the accused prisoner to mount a defense is restricted by prolonged administrative detention. Consequently, the prisoner who, before formally being charged, is isolated in administrative detention pending investigation and trial for a crime committed in the institution is constitutionally entitled to the assistance of appointed counsel when the prolonged nature of that detention threatens the delicate balance in the adversarial process by impairing the accused's ability to prepare a defense.

B. The Decision Below

To view the court of appeals'

decision in United States v. Gouveia, 704 F.2d 1116 (9th Cir. 1983) as nothing more than a condemnable, radical departure from the vested and durable history of the Sixth Amendment right to counsel is to suffocate the revered notion of a living Constitution. For before the court in United States v. Gouveia were circumstances calling for application of a constitutional right in a context never before encountered. The causes of justice and constitutional integrity would have been poorly served by the court of appeals' thoughtless application of constitutional doctrine, spawned in other arenas, to a set of facts suggesting compelling but heretofore unencountered concerns.

The opinion in the instant case, however, has remained true to the rich heritage of the right to counsel even as it has recognized the need to expand

that fundamental protection "when new contexts appear presenting the same dangers that gave birth initially to the right itself." United States v. Ash, 413 U.S. 300, 311 (1973). If reviewed in a spirit cognizant of Sixth Amendment history but sensitive to adaptation as a valued constitutional corollary, the court of appeals' decision can be endorsed as a prudent yet cautious application of the right to counsel in the context of prison crime prosecutions.

Stated in summary fashion, United States v. Gouveia involves the consolidated cases of six federal prison inmates convicted of murders committed in the Federal Correctional Institution at Lompoc, California. Each of the inmates was isolated in administrative detention for periods of time ranging from eight to nearly twenty months before official criminal charges were

brought, without the benefit of appointed counsel. Though adjudicated guilty of their respective crimes in internal prison disciplinary proceedings held shortly after the crimes, the inmates were at all relevant times the objects of continuing investigation for criminal prosecution by the Federal Bureau of Investigation.

Isolated in administrative detention as the government built its cases against them, the inmates uniformly were denied access to the general prison population and the physical environs of the penitentiary. No inmate so isolated was prohibited from telephoning or having visits from an attorney of his choice, but each was shown to have lacked the financial means to hire private counsel. The arraignment of each defendant was the stage at which appointed counsel first became available

to commence preserving evidence and preparing the defense to the murder indictments returned after months of administrative detention. Ultimately, the detainees were tried, convicted and sentenced to terms of life imprisonment for the crimes at issue in each case. The issue before the circuit court of appeals was "whether the isolation of appellants in administrative detention pending investigation and trial obligated prison officials to provide counsel at any time prior to appellants' indictments." 704 F.2d at 1119.

Guiding the court of appeals throughout its analysis of the foregoing issue of first impression was the premise that the Sixth Amendment right to counsel historically was designed to assure fairness in the adversary criminal process. The court therefore determined that administrative detention

used by the government, not as a disciplinary or security measure but as a tool to isolate an inmate pending trial, is accusatory both in its purpose and its effect. In a vein clearly inspired by Kirby v. Illinois, 406 U.S. 682 (1972), the court held that the realities of the prison environment compel the conclusion that a prisoner is functionally accused for Sixth Amendment purposes sufficient to invoke the right to appointed counsel at a stage in his administrative detention prior to formal indictment. The majority reasoned that Kirby's literal suggestion of an indictment, information, arraignment, or preliminary hearing as indicia of the beginning of adversary criminal proceedings is unworkable and unrealistic in the controlled confines of the penitentiary because prisoners are "subject to the discretion of government officials

in a way that individuals outside prison are not." 704 F.2d at 1120.

To illustrate the sharp contrast with law enforcement practices in free society, the opinion of the court of appeals highlights the following unique considerations associated with the investigation and prosecution of prison crimes:

Upon arrest a defendant must be arraigned "without unnecessary delay." Fed.R.Crim.P. 5(a). At that point the accused is guaranteed the assistance of counsel. No such procedural guarantees operate in prison, where the suspect may be isolated throughout the pendency of the government's investigation.

* * *

In the instant case ... the government was able to delay appellants' arraignment for up to twenty months, thereby effectively suspending the right to counsel until its case was built ... Formal charges need not be brought until the government is ready for trial because the suspect

can be isolated without being arrested.

704 F.2d at 1122.

Of substantial concern to the court of appeals was the adverse effect upon the accused's right to a fair trial flowing from government exploitation of its investigatory advantage, while the isolated and uncounseled inmate is left virtually helpless to take steps necessary to preserve his own defense.

Worthy of particular note, however, is the painstaking manner in which the court of appeals heeded the mandate of this Court to find a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." Wolff v. McDonnell, 418 U.S. at 556. A wooden approach to the sensitive interests at stake for prison administrators and inmates undoubtedly

would have produced an unsatisfactory resolution. But the court of appeals carefully refrained from exalting the accused's right to counsel over the legitimate security and administrative concerns of the institution, holding instead that the right to counsel attaches only at a point in the term of the prisoner's administrative detention at which appointed counsel is necessary to assure that the accused will receive effective assistance of counsel at the trial itself. United States v. Gouveia, 704 F.2d at 1124. Thus, the court unequivocally stated that appointment of counsel is not mandated at the earliest stages of the investigation of prison crime before the adverse positions of government and inmate have solidified. Similarly, counsel still is not the right of an inmate who is subject to internal disciplinary proceedings for

conduct which may also be a crime. See, Wolff v. McDonnell, 418 U.S. at 570.

Proceeding, therefore, on the sound principles that the longer an inmate is isolated following the commission of a crime the more the detention takes the form of an accusation, and that counsel can ameliorate the adverse consequences of detention if the appointment comes within a reasonable time of its commencement, the court of appeals concluded as follows:

... [A] prisoner, who is being held in isolation because of an impending investigation and indictment related to a serious crime, must be provided counsel, subject to the same conditions as are applicable to an indigent following indictment, after a reasonable time. If counsel is not so provided [the detained inmate] must be released into the general prison population.

704 F.2d at 1124.

The remedy of release from detention as an alternative to appointment of

counsel is further evidence of the court of appeals' profound sensitivity to the need to strike an appropriate balance between competing interests of adversaries. Thus, the government is at all times free to choose between releasing the detainee into the prison population or appointing counsel while continuing the accused's administrative isolation.

Although its decision had breathed life into a constitutional guarantee that previously had no real meaning in the prison context, the court of appeals' ruling stems not from obtuse theory but from lawfully promulgated prison regulations to provide specificity to the constitutional right to counsel and to establish an appropriate measure for the "reasonable time" standard by which the right is guided. Those prison regulations, the majority astutely observed, "create a condition of confinement that

embodies an accusation which generates a Sixth Amendment right to the assistance of counsel." Id. at 1124.

Specifically, prison regulations mandate that the maximum stay in isolation for purposes of discipline is ninety days. So when that ninety day period is exceeded, objective criteria exists from which to infer that the detention is for a purpose other than discipline. While the rule fashioned by the court of appeals allows the government to refute an inmate's claim that his continued detention is due to a pending investigation or trial for a criminal act, the lapse of ninety days is the measure of a "reasonable time" after which counsel presumptively is necessary to assure that the accused's right to a fair trial is preserved.

If the government elects to provide the detained inmate with counsel, the

objective is realized because a legally trained advocate will assume responsibility for preparing and preserving a defense to the impending criminal charges even though the accused remains in isolation indefinitely. But the same end of preserving the right to a fair trial is served if, at the government's option, the inmate is released from detention to pursue his own orderly investigation of the alleged crime and his potential defenses prior to formal indictment.

To be sure, the defendant's right to a fair trial free from the taint of all overreaching is still at risk even in this scheme because the investigatory handicap that is the underlying evil may well attach prior to the passage of his ninety days in isolation. The elimination of all such risk, the majority in Gouveia recognized, is not possible

except in a vacuum. But as a decision cognizant of fiercely competing yet equally compelling interests, United States v. Gouveia is exemplary in its achievement of a proper balance consistent with the ends of justice as well as orderly prison administration.

C. United States v. Gouveia:
A Silhouette Of Sixth Amendment
Precedent And Policy

If nothing more than companionship and facilitation for the criminally accused were deemed the values of attorney representation, the Sixth Amendment's assurance that "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence" would be an empty platitude. In a system of adversary judicial proceedings, however,

counsel's role is not akin to a mission of mercy. An advocate trained in the science of law, counsel functions "to remove disabilities of the accused" United States v. Ash, 413 U.S. 300, 312 (1973), and to minimize the "danger of conviction because [the defendant] does not know how to establish his innocence." Gideon v. Wainwright, 372 U.S. 335, 345 (1963). But beyond the individual interests of the defendant in avoiding an unjust conviction, the presence of counsel for the accused serves the greater public interest of guarding the integrity of the fact-finding process and enhancing the fairness of the adversary system of justice. United States v. Wade, 388 U.S. 218 (1967).

Against this background, an analytical framework has surfaced from the decisions of this Court that serves as a guide for resolving Sixth Amendment

right to counsel issues. By its own terms the Sixth Amendment refers to rights in connection with criminal prosecutions, yet the decisions of this Court confirm that a defendant is entitled to the assistance of counsel not only at trial, but "at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, 388 U.S. at 226. Accord, Coleman v. Alabama, 399 U.S. 1 (1970); Gilbert v. California, 388 U.S. 263 (1967).

Regarding the requirement that there be a "prosecution", this Court has held that the right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against an accused because that event marks the point at which the adverse positions of government and defendant

have solidified. Kirby v. Illinois, 406 U.S. 682, 688, 689 (1972). Beyond that, however, the determination must be made as to whether a specific pretrial event is a critical stage requiring the presence of counsel "to preserve the defendant's ... right meaningful to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." United States v. Wade, 388 U.S. at 227.

One need not assail the wisdom or logic of the two-stage analysis outlined above to recognize that the Sixth Amendment right to counsel as it arises in the context of a prison crime prosecution is peculiar and therefore ill suited to an analysis born of other considerations. Thus, Kirby's effort to declare by reference to traditional procedural events the precise point at which adversarial proceedings begin

against a free citizen does not pretend to address the alternative methods by which the prosecutorial forces of the government may be focused on a prisoner suspected of a crime. Consider that, with respect to the Fifth Amendment privilege against self-incrimination, this Court implicitly acknowledged that the mechanism for safeguarding certain constitutional rights of persons lawfully incarcerated must be tailored to the realities of the prison environment if there is to be any protection at all. Mathis v. United States, 391 U.S. 1 (1968). Mathis held that a prisoner is in custody for purposes of the Fifth Amendment notwithstanding the argument that the continuous nature of the prisoner's lawful incarceration mandates that there be more of a physical restriction than mere confinement with the general prison population. Mathis v.

United States, 391 U.S. 1, 7 (White, J., dissenting). Similarly, the protections of the Sixth Amendment right to counsel can endure in the prison context only if the inquiry is freed of certain analytical constraints that obscure what is actually at stake.

An assumption of the standard Sixth Amendment analysis that looks first for evidence that adversary judicial proceedings have been initiated and second for an indication that the event in question is a critical stage requiring the assistance of counsel is that no one not formally accused will be prejudiced by the absence of an attorney's assistance while the government investigates the crime. See, Kirby v. Illinois, 406 U.S. 682, 690. The theory is that a person not yet charged with a crime needs no help in coping with legal problems or assistance in meeting his

professional adversary because he has no adversary.

Indeed, in the investigatory stage the government does not behave as an adversary of the citizen who is simply a suspect; the citizen remains free to conduct his affairs without interference or government restraint of any kind. Until such time as the government commits itself to prosecute and confronts an accused with the prosecutorial forces of an organized society, counsel is presumed to be unnecessary. Moore v. Illinois, 434 U.S. 220 (1977). Moreover, the suspect is not in a position to accelerate the point at which the right to counsel will attach because, "Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause [for an arrest] ..."

Hoffa v. United States, 385 U.S. 293, 310 (1966).

For prison crime prosecutions, however, those assumptions dissolve and the analysis produces an undesirable anomaly. Granted that the prisoner-suspect is in no better position than a free citizen under Hoffa to force the government's hand for the purpose of invoking the Sixth Amendment right to counsel, but the government need not behave benignly towards the prisoner-suspect as it must towards the citizen-suspect. On the contrary, the government can assume the role of an adversary vis-a-vis the prisoner without its adversarial practices having to conform to the constitutional limitations that control when that role is formalized by the initiation of a charge. Segregation of the prisoner in administrative detention while the government builds

its case is the vivid illustration from the case at bar that the government functionally accuses in the prison context, and then exploits that advantage, without having to accuse in fact. The resulting anomaly is that, while the predicate of an adversary judicial criminal proceeding has not been satisfied when the prisoner-accused is detained indefinitely prior to being charged, that interim period during which the accused is helpless to take steps to preserve his defense takes on all of the characteristics of a "critical stage" requiring the assistance of counsel.

Thus, a pretrial event is critical and requires the provision of counsel if it threatens to prejudice the defendant's rights and if the assistance of an attorney will help to avoid that prejudice. United States v. Wade, 388 U.S.

at 227. With respect to a preliminary hearing at which probable cause for charging the accused with an offense is determined, this Court held in Coleman v. Alabama, 399 U.S. 1 (1970) that the potential prejudice to the defendant is that the hearing may be the vehicle for an erroneous or improper prosecution. Though counsel may or may not succeed in exposing fatal weaknesses in the government's case that cause the magistrate to refuse to bind the accused over, counsel's participation in that proceeding nevertheless was recognized as essential to preserve testimony favorable to the accused of a witness who does not appear at trial and to discover the case against the defendant in order to prepare the appropriate defense.

In much the same way, the prisoner isolated in administrative detention is prejudiced because, though not yet

charged, the occasion of his detention can be exploited to facilitate an improper prosecution. More importantly, isolation without the aid of legal counsel deprives the accused of the opportunity to realize the investigatory advantages of a lawyer's assistance that would compensate for his own inability to probe. And the potential benefit of "what a prompt and thorough-going investigation might disclose as to the facts" should never be underestimated. Powell v. Alabama, 287 U.S. 45, 58 (1932).

There is an additional consideration that is even more notable in regard to the critical characteristic of the prisoner-accused's indeterminate detention pending the formal charge for a prison crime. As this Court traced the historical expansion of the Sixth Amendment right to counsel in United

States v. Ash, 413 U.S. 300 (1973), it noted that the expansion has come when circumstances require counsel's participation in a pretrial event to remove disabilities of the accused in the same fashion that counsel compensates for the disabilities of the layman at trial. Ash held that the right to counsel does not extend to the prosecution's trial-preparation interviews with witnesses because, "The traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself." Id. at 318. Equality of access was cited in Ash as a valuable force that removes "any inequality in the adversary process itself and thereby fully satisfies the historical spirit of the Sixth Amendment's counsel guarantee." Id. at 319.

But without that equality of access so important to maintaining an appropriate balance in the adversarial process, an accused is overpowered by his professional adversary at every step taken in preparation for trial including those that are not strictly confrontational. The obvious disability of an isolated prisoner who is detained because he is about to be charged with a crime is that, without attorney assistance, he has no access to the evidence that would be his defense at a time when prompt action to discover and preserve it is essential.

If the right to counsel is to endure meaningfully in the context of a prison crime prosecution, therefore, the search for an accommodation need not deviate significantly from the historical interpretation of the Sixth Amendment. What is necessary, though, is to

recognize that the detention of a prisoner because he is to be charged with a crime is logically and conceptually akin to the commencement of formal adversarial criminal proceedings against a person whose liberty is not already abridged by incarceration. And because the events that transpire during the interim period of detention "might well settle the accused's fate and reduce the trial itself to a mere formality", United States v. Wade, 388 U.S. at 224, these new circumstances justify an expansion of the right to counsel to counteract the same dangers that gave birth initially to the right itself. To adhere to a rule authorizing appointment of counsel only at or after the time that the criminal accusation against the isolated prisoner is formalized will "convert the appointment of counsel into a sham and nothing more

than a formal compliance with the constitution's requirement that an accused be given the assistance of counsel." Avery v. Alabama, 308 U.S. 444, 446 (1939).

D. The Remedy

When a violation of the Sixth Amendment right to counsel has been established, its effect must be identified and purged to make certain that the defendant has been effectively represented and not unfairly convicted. United States v. Morrison, 449 U.S. 361 (1981). In the instant case, the court of appeals found such a violation and held that its effect was to undermine irreparably the critical ability of the defendants to preserve their defenses at the early stages of the investigation. Tailoring the remedy to an injury found

to be immune from an after-the-fact cure, the court of appeals ruled that the only certain remedy was to dismiss the indictments.

While the court opined that prejudice to the defendants' ability to defend against the charges could be presumed from the undisputed fact of their lengthy administrative detention, the majority affirmed the district court findings in regard to some defendants' irrevocable loss of inmate witnesses and the deterioration of physical evidence essential to corroborate the defendants' testimony. United States v. Gouveia, 704 F.2d 1116, 1126 (1983).

As an abstract proposition, the remedy for a constitutional violation in the criminal arena need not go beyond denying the prosecution the fruits of its transgression. Justice is served when the taint of government

overreaching is neutralized so that the criminal prosecution can proceed, as nearly as possible, as if the constitutional guarantee had been respected. The exclusion of evidence obtained in violation of the Fourth Amendment is the clearest example of such a keenly focused remedy. That is not to suggest, however, that a particular constitutional violation cannot so pervasively and irreparably infect the process by which guilt or innocence will be determined that there is no realistic prospect of averting those adverse consequences if the matter goes to trial. This Court's decision in United States v. Morrison, supra, is not to the contrary.

Where, as here, the violation of the right to counsel is in the context of a pretrial event, analysis of the damage "depends upon an assessment of those factors that made the denial

error." Coleman v. Alabama, 399 U.S. 1, 18 (White, J., concurring). Thus, for the prisoner detained because he will be charged with a crime, this analysis already has observed that the right to counsel is violated because he is functionally accused and requires attorney assistance to compensate for his own inability to preserve his defense. To the extent that such a defendant makes a showing that important physical evidence or testimony of witnesses unavailable at trial could have been preserved had counsel been appointed at the appropriate time, then it is clear that the drastic remedy of dismissal of the indictment is warranted.

That defendant, however, is inherently disadvantaged in this task because he is compelled to prove that his defense has been prejudiced by the

irretrievable loss of favorable evidence, the precise substance of which cannot be determined owing to the lack of attorney assistance to preserve it. The nature of the violation in cases such as this, therefore, uniquely effects both the integrity of the conviction and the defendant's ability to document with precision how the transgression prejudiced his defense. The remedy chosen in any case involving such a Sixth Amendment violation must not be blind to this reality.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 83-128-CFY
Status: GRANTED

Title: United States, Petitioner
V.
William Gouveia, et al.

Docketed:
July 25, 1983

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Araujo, Manuel U. A., Treman, Michael
J., Diamond, Charles P., Walsh, Joseph F.,
Levine, Joel, Saul, Edwin S.

Entry	Date	Note	Proceedings and Orders
1	Jun 14 1983		Application for extension of time to file petition and order granting same until July 25, 1983 (Rehnquist, June 17, 1983).
2	Jul 25 1983	G	Petition for writ of certiorari filed.
4	Aug 18 1983		Order extending time to file response to petition until September 23, 1983.
5	Sep 6 1983		Brief of respondent Robert Ramirez in opposition filed.
6	Sep 6 1983	G	Motion of respondent Robert Ramirez for leave to proceed in forma pauperis filed.
7	Sep 23 1983		Brief of respondent Philip Segura in opposition filed.
8	Sep 23 1983	G	Motion of respondent Philip Segura for leave to proceed in forma pauperis filed.
9	Sep 23 1983		Brief of respondent Robert Eugene Mills and Raymond Pierce in opposition filed.
10	Sep 23 1983	G	Motion of respondents Robert E. Mills and Raymond Pierce for leave to proceed in forma pauperis filed.
11	Sep 24 1983		Brief of respondent Adolpho Reynoso in opposition filed.
12	Sep 28 1983		DISTRIBUTED. October 14, 1983
13	Oct 7 1983	X	Reply brief of petitioner United States filed.
14	Oct 17 1983		Motion of respondent Robert Ramirez for leave to proceed in forma pauperis GRANTED.
15	Oct 17 1983		Motion of respondent Philip Segura for leave to proceed in forma pauperis GRANTED.
16	Oct 17 1983		Motion of respondents Robert E. Mills and Raymond Pierce for leave to proceed in forma pauperis GRANTED.
17	Oct 17 1983		Petition GRANTED. *****
19	Nov 23 1983		Order extending time to file brief of petitioner on the merits until December 15, 1983.
20	Dec 16 1983		Application for leave to file petitioner's brief on the merits in excess of the page limitation to WHR (A-469). Above application granted by Rehnquist, J. on 12/16/83.
23	Dec 15 1983		Brief not to exceed 60 pages.
24	Dec 23 1983		Lodging from petitioner United States filed.
25	Dec 23 1983		Brief of petitioner United States filed.
26	Dec 23 1983		Joint appendix filed.
27	Sep 6 1983	G	Motion of respondent Robert Ramirez for appointment of counsel filed.

Entry	Date	Note	Proceedings and Orders
28	Sep 23 1983	G	Motion of respondent Philip Segura for appointment of counsel filed.
29	Oct 24 1983	G	Motion of respondent William Gouveia for leave to proceed in forma pauperis filed.
30	Oct 24 1983	G	Motion of respondent William Gouveia for appointment of counsel filed.
31	Dec 14 1983	G	Motion of respondents Robert E. Mills and Richard Raymond Pierce for appointment of counsel filed.
32	Dec 14 1983	G	Motion of respondents Robert E. Mills and Richard Pierce for divided argument filed.
33	Dec 24 1983	D	Motion of respondents William Gouveia, et al. for divided argument filed.
34	Jan 5 1984		Record filed.
35	Jan 5 1984		Certified original record & C.A. proceedings, 2 boxes, received.
36	Jan 9 1984		Motion for appointment of counsel GRANTED and it is ordered that Joseph F. Walsh, Esquire, of Los Angeles, California, is appointed to serve as counsel for the respondent Robert Ramirez in this case.
37	Jan 9 1984		Motion for appointment of counsel GRANTED and it is ordered that Joel Levine, Esquire, of Los Angeles, California, is appointed to serve as counsel for the respondent Philip Segura in this case.
38	Jan 9 1984		Motion of respondent William Gouveia for leave to proceed in forma pauperis GRANTED.
39	Jan 9 1984		Motion for appointment of counsel GRANTED and it is ordered that Michael J. Treman, Esquire, of Santa Barbara, California, is appointed to serve as counsel for the respondent William Gouveia in this case.
40	Jan 9 1984		Motion for appointment of counsel GRANTED and it is ordered that Charles P. Diamond, Esquire, of Los Angeles, California, is appointed to serve as counsel for the respondents Robert E. Mills and Richard Raymond Pierce in this case.
41	Jan 9 1984		Motion of respondents Robert E. Mills and Richard Pierce for divided argument GRANTED.
42	Jan 9 1984		Motion of respondents William Gouveia, et al. for divided argument DENIED.
44	Jan 10 1984		Order extending time to file brief of respondent on the merits until February 3, 1984.
45	Jan 12 1984		Brief amicus curiae of National Legal Aid and Defender Association filed.
47	Feb 3 1984		Brief of respondent Robert Ramirez filed.
48	Feb 3 1984		Brief of respondent Adolpho Reynoso filed.
49	Feb 3 1984		Brief of respondents Robert Eugene Mills, et al. filed.
50	Feb 3 1984		Brief of respondent Philip Segura filed.
51	Feb 3 1984		Brief amicus curiae of American Civil Liberties Union Foundation filed.
52	Feb 14 1984		SET FOR ARGUMENT. Tuesday, March 20, 1984. (3rd case)
53	Feb 3 1984		Brief of respondent William Gouveia filed.
54	Feb 27 1984		CIRCULATED.

Entry	Date	Note	Proceedings and Orders
55	Mar 6 1984		Application for leave to file petitioner's reply brief in excess of the page limits filed with WHR (A-712).
56	Mar 7 1984		Order granting same not to exceed 30 pages by Rehnquist, J.
57	Mar 9 1984	X Reply	brief of petitioner United States filed.
58	Mar 9 1984		Three lodgings received from the Solicitor General. To be returned.
59	Mar 13 1984		Lodging recieved.
60	Mar 20 1984		ARGUED.